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Supreme Court of the United States

October Term, 1995

V-1 OIL COMPANY, an Idaho Corporation,
Petitioner,

vs.

IDAHO PETROLEUM CLEAN WATER TRUST FUND,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Idaho

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the decision of the Idaho Supreme Court, denying V-1 Oil the right to a refund or other relief after paying a tax found to be unconstitutional, violates the Fourteenth Amendment Due Process Clause, depriving V-1 Oil a meaningful opportunity to postpayment relief for taxes paid pursuant to a tax scheme found unconstitutional.

II. Whether the Idaho Supreme Court's opinion should be vacated as to the refund/relief issue as violative of the Fourteenth Amendment due process, when that issue was never briefed, argued or a question raised on appeal.

LIST OF PARTIES

All parties to the Idaho Supreme Court proceedings below whose judgment is sought to be reviewed include: Idaho Clean Water Trust Fund, Respondent; Western Petroleum Marketer's Association, Idaho Division, Amicus Curiae; Idaho Highway Users, Inc., Amicus Curiae; V-1 Oil Company, ("V-1") an Idaho Corporation, Petitioner. Petitioner, V-1 Oil Company, Inc., has no parent companies, subsidiaries or affiliates.

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I. The decisions below violate V-1 Oil's Fourteenth Amendment right of due process, entitling an opportunity to postpayment relief for taxes already paid pursuant to a tax scheme found unconstitutional, and directly conflicts with this Court's due process analysis established in *McKesson v. Division of Alcoholic Beverages and Tobacco* and its progeny. 7

II. The Idaho Supreme Court's *sua sponte* ruling on the refund/relief issue is a violation of the due process clause because the ruling denied V-1 the opportunity to brief and argue the issue, is

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contrary to regularized and orderly judicial process, and ignores statutory and constitutional provisions, therefore, this Court should vacate the judgment as to that issue and remand for further proceedings consistent with due process. 13

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OPINIONS BELOW

The opinion of the Supreme Court of Idaho dated July 2, 1996 is unreported as of yet. It is reprinted in the Appendix hereto at Appendix A at 1a-17a. The opinion of the Supreme Court of Idaho dated April 16, 1996 is unreported as of yet. It is reprinted in the Appendix hereto at Appendix B at 18a-32a. The opinion of the Supreme Court of Idaho dated August 3, 1995 is unreported as of yet. It is reprinted in the Appendix hereto at Appendix C at 33a-47a. The Memorandum Decision granting summary judgment, dated December 13, 1993, and the Order granting summary judgment dated January 11, 1994, are unreported. They are reprinted in the Appendix hereto at Appendix D at 48a-51a and Appendix E at 52a-77a.

STATEMENT OF JURISDICTION

The Substitute Opinion of the Supreme Court of Idaho, denying V-1's Petition for Rehearing, sought to be reviewed was entered July 2, 1996. It is unreported. It is reprinted in the Appendix hereto at Appendix A. This opinion substitutes for the April 16, 1996 opinion. This opinion is unreported. It is reprinted in the Appendix hereto at Appendix B. This Petition for Writ of Certiorari is timely filed September 30, 1996. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution, Amendment XIV, provides:

> . . . Nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Idaho Constitution, Article VII, Section 13, provides:

> No money shall be drawn from the treasury, but in pursuance of appropriations made by law.

Idaho Constitution, Article VII, Section 17, is reprinted in the Appendix hereto at Appendix I at 110a.

Relevant provisions of Idaho Code Title 63, Chapter 24, are reprinted in the Appendix hereto at Appendix I at 100a-104a.

Relevant provisions of Idaho Code Title 41, Chapter 49, are reprinted in the Appendix hereto at Appendix I at 105a-108.

Idaho Code Title 67, Chapter 3511(2) is reprinted in the Appendix hereto at Appendix I at 109a.

STATEMENT OF THE CASE

This case involves the fundamental principle of due process in two areas. One, as it relates to a state's requirement to afford meaningful postpayment relief to a party for taxes already paid pursuant to a scheme found unconstitutional. Two, as it relates to the protection of individual property rights from arbitrary termination when a state's highest court chooses to rule on an issue, *sua sponte*, without allowing for a party's constitutional right to be heard.

The state of Idaho enacted the Idaho Petroleum Clean Water Trust Fund Act of 1990, ("ACT") which imposes a one cent per gallon "transfer fee" upon distributors of petroleum products and then used to fund a trust for underground storage tank insurance. The state of Idaho enacted this ACT in order to assist Idaho underground storage tank owners and operators in

complying with congressional legislation that provided for the regulation of underground storage tanks and the clean up of leaks and releases from these tanks. 42 U.S.C. §§ 6991-6991i. These implementing regulations set out a comprehensive framework for the operation of underground storage tanks, including requirements for technical performance standards, corrective action to investigate and remediate tank releases, and, as applies here, financial responsibility standards. 40 C.F.R. § 280.[1]

On March 12, 1992, Petitioner V-1 Oil Company, ("V-1") a distributor of petroleum products, filed a complaint against Respondent, Idaho Petroleum Clean Water Trust Fund ("Trust Fund"), alleging that (1) the transfer fee is actually a tax on gasoline and motor fuels and its intended use therefore violates Idaho Constitution Art. VII, § 17, (2) that all funds collected pursuant to the Act should be refunded, and (3) the Act violates the constitutional right to freedom of contract and anti-trust laws. On September 17, 1992, the freedom of contract and anti-trust claims were dismissed. On January 29, 1993, V-1 filed a Motion for Summary Judgment in which V-1 requested the court to rule as a matter of law that the transfer fee imposed pursuant to the Act is unconstitutional. On June 1, 1993, the Trust Fund filed a Cross-motion for Summary Judgment on the constitutionality of the Act and a Motion for Summary Judgment on V-1's right to a refund. On December 13, 1993, the trial court granted partial summary judgment in favor of V-1 on its first allegation holding that the transfer fee was a tax.

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1. This legislation was enacted in two stages as amendments to the Resource Conservation and Recovery Act of 1976. 42 U.S.C. §§ 6901-6992k. The first provisions were added by the Hazardous and Solid Waste Amendments of 1984. Pub. L. No. 98-616, 98 Stat. 3277 (1984). Additional components of the program were enacted as part of the Super Fund Amendments and Reauthorization Act of 1986. Pub. L. No. 99-499, 100 Stat. 1696 (1986).

(Appendix D, p. 49a). The court however, denied the Trust Fund's summary judgment and left for trial the resolution of V-1's refund claim asserting that the record was not sufficient to determine what remedy was available to V-1. (Appendix D); (Appendix C, p. 38a; Appendix A, p. 7a). The Trust Fund subsequently appealed the issue of the constiutionality of the transfer fee only, and on August 3, 1995, the Idaho Supreme Court issued an opinion which correctly affirmed the trial court's finding that the transfer fee was a tax. The Trust Fund then petitioned for a rehearing on this August 3, 1995 opinion. The Idaho Supreme Court then issued a substitute opinion dated April 16, 1996, which again reaffirmed that the transfer fee was a tax. However, the Idaho Supreme Court took it upon itself to revisit the issue of V-1's refund claim upon which the trial court had received no evidence, heard argument or ruled upon. Without having a sufficient record, briefs submitted or argument, the Idaho Supreme Court ruled that V-1 was not entitled to a refund of the taxes paid pursuant to the unconstitutional tax scheme. (Appendix B, 29a). In response to the court's opinion, V-1 filed a Petition for Rehearing, detailing and indicating that the court's decision on the refund issue was contrary to Idaho and United States Supreme Court precedent, in violation of state statutes and the United States Constitution. (Appendix I). Despite V-1's Petition pointing out the numerous problems with the Idaho Supreme Court deciding on an issue never raised before them, the court denied V-1's Petition and upheld its decision by reissuing a substitute opinion on July 2, 1996, (Appendix A) replacing the court's opinion of April 16, 1996. V-1 now has timely filed this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

This case involves the fundamental principle of due process in two areas. One, as it relates to a state's requirement to afford meaningful postpayment relief to a party for taxes already paid pursuant to a scheme found unconstitutional. Two,

as it relates to the protection of individual property rights from arbitrary termination when a state's highest court chooses to rule on an issue, *sua sponte*, without allowing for a party's constitutional right to be heard.

The Supreme Court of Idaho erroneously ruled, *sua sponte*, that V-1 Oil is not entitled to a refund for taxes paid pursuant to a scheme the Idaho Supreme Court found unconstitutional. In so doing, the court has gone beyond simple error or misapplication of law; the court has made decisions that reek of gross injudicious conduct. By precluding V-1, and countless others who have paid into the insurance fund, from making a rightful refund claim against the tax moneys unconstitutionally taken, the Idaho Supreme Court has given a $50,000,000 windfall to the state of Idaho. (Letter dated May 6, 1996 of Deputy Attorney General Theodore V. Spangler, Jr., Appendix F, p. 80a). In support of their ruling, the Idaho Supreme Court has cited no constitutional, statutory, case or policy arguments. The court simply dispenses with the substance of the refund/relief litigation with six vague sentences. (Appendix A, p. 12a). Without this Courts review, the Idaho Supreme Court will have given a $50,000,000 gift to the state in an arbitrary and patently unconstitutional manner. The Idaho Supreme Court's decision denying any postpayment relief also directly conflicts with this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), and ignores this Court's precedents that a state provide retrospective relief to a party for its payment of an unlawful tax. Further, the Idaho Supreme Court's ruling on the refund/relief issue, *sua sponte*, is a violation of due process by, not allowing argument or briefing, ignoring regularized, orderly judicial process, statutory and constitutional interpretation and case precedent. Therefore, the Idaho Supreme Court has deprived V-1 of its opportunity to be heard before the final termination of its rightful property claim.

The sole issue on appeal before the Idaho Supreme Court was whether a "transfer fee is a tax on motor vehicle fuels." (Appendix A, 10a). The trial court originally granted partial summary judgment on this issue holding that the transfer fee was a tax. The trial court also, at that time, denied Idaho Petroleum Clean Water Trust Fund's (Trust Fund) summary judgment and left for trial the resolution of V-1's refund claim because the record was not sufficient to determine what remedy was available to V-1. (Appendix C, p. 38a; Appendix A, p. 7a). On appeal, the Idaho Supreme Court issued a August 3, 1995 opinion which correctly affirmed the trial court's finding that the transfer fee was a tax. The Trust Fund subsequently petitioned for a rehearing and the Idaho Supreme Court issued a substitute opinion on April 16, 1996 which also reaffirmed that the transfer fee was a tax. However, the Idaho Supreme Court went one step further and addressed the issue of V-1's refund claim, notwithstanding it had not been at all developed or ruled upon below, was not part of the appeal, and had not been briefed or argued. Without having a sufficient record, briefs submitted or argument, the court ruled that V-1 was not entitled to a refund of the taxes paid pursuant to the unconstitutional tax scheme.

The Idaho Supreme Court's decision on V-1's refund claim conflicts with this Court's analysis in *McKesson*, and the opinion provides no rational explanation or support for its *sua sponte* ruling. In response to the court's opinion, V-1 filed a Petition for Rehearing, supported by memorandum (Appendix G, 81a), outlining specific state and United States Supreme Court precedent that were violated by that court's ruling, including the *McKesson* decision. Despite the apparent constitutional and procedural problems and the fact that the refund claim was not an issue on appeal, the Idaho Supreme Court callously denied V-1's petition without further argument or briefing and upheld its decision by reissuing a substitute opinion on July 2, 1996, replacing the court's opinion of April

16, 1996. Since the nature of this ruling is contrary to fundamental notions of due process, this Court's established precedent and the fact that there is no support for the court's decision on issues not presented to it, the Idaho Supreme Court's ruling warrants review by this court.[2]

I.

THE DECISIONS BELOW VIOLATE V-1 OIL'S FOURTEENTH AMENDMENT RIGHT OF DUE PROCESS, ENTITLING AN OPPORTUNITY TO POSTPAYMENT RELIEF FOR TAXES ALREADY PAID PURSUANT TO A TAX SCHEME FOUND UNCONSTITUTIONAL, AND DIRECTLY CONFLICTS WITH THIS COURT'S DUE PROCESS ANALYSIS ESTABLISHED IN *MCKESSON V. DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO* AND ITS PROGENY.

This Court's precedents establish that:

> if a State penalizes taxpayers for failure to remit their taxes in timely fashion, this requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity

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2. The result of this litigation has far reaching impact beyond the borders of Idaho. Oregon has already ruled on this issue and held that their underground storage tank assessment "tax" was unconstitutional. *Automobile Club of Oregon v. State*, 840 P.2d 674 (1992). Cases are also pending in Utah and Wyoming. Virtually every state has adopted similar schemes to provide underground storage tank owners and operators compliance with EPA mandated "financial responsibility" requirements for the maintenance and use of underground storage tanks.

> to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

McKesson Corp v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 22 (1990).

McKesson is the most recent in a line of cases which stands for the Constitutional principle that a taxpayer is entitled to a clear and certain remedy for a state's unlawful exaction of tax moneys pursuant to an unconstitutional scheme. *McKesson* involved a suit by a liquor distributor to recover taxes it had paid under protest, alleging that the tax scheme violated the Commerce Clause because a tax preference providing special rate reductions was given to certain products grown within the state and used in alcoholic beverages. McKesson's products did not qualify for the rate reductions. A Florida trial court granted partial summary judgment invalidating the tax scheme. The court however, declined to order a refund or any other form of relief for the taxes previously paid under the unconstitutional scheme. The Florida Supreme Court affirmed, ruling that the tax scheme was unconstitutional and that the refusal to order a refund was proper. This Court agreed that the tax scheme was unconstitutional but disagreed with the Florida Supreme Court and concluded that the liquor distributor was entitled to a refund or, because the state court did not invalidate the scheme in its entirety, the state was free to choose some alternative course in providing a meaningful remedy. Justice Brennan, for a unanimous Court explained:

> Because exaction of a tax constitutes a deprivation of property, the state must provide procedural safeguards against unlawful exactions in order to satisfy the commands of Due Process. The state may

> choose to provide a form of "predeprivation process," . . . or [the state can allow] taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the state. . . . To satisfy the requirements of the Due Process Clause, therefore, in this refund action *the state must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "clear and certain remedy," for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.*

Id. at 36-39 (citations omitted) (emphasis added).

In the case at hand, however, the Idaho Supreme Court did not provide any safeguards against unlawful exaction of taxes or allow for any "clear and certain remedy" for the unconstitutional tax collection. In fact, the Idaho Supreme Court did not allow V-1 even a fair opportunity to make a refund claim because the court decided the issue without having allowed the presentation of evidence below, much less briefs and argument submitted by either party on appeal. This *sua sponte* ruling ignores this Court's additional case precedent highlighting a state's constitutional duty to provide retrospective relief to a party for its payment of an unlawful tax.

In *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280 (1912), this Court explained the scope of a state's obligation to provide retrospective relief as part of its postdeprivation procedures in a tax refund suit. Here, a railroad company brought suit to recover taxes it had paid under protest, alleging

that the law under which the tax was levied was in violation of the Commerce Clause because most of the franchise tax was apportioned to business conducted wholly outside the state. In ruling that the company was entitled to a refund, Justice Holmes stated:

> It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. . . . [A]part from special circumstances he cannot interfere by injunction with the state's collection of its revenues, [therefore] an action at law to recover back what he has paid is the alternative left.

Id. at 285.

Here, the law was invalidated in its entirety. Therefore the only appropriate relief was for this Court to order a refund. By issuing a judgment entitling the railroad company to a refund of the tax, the taxpayer was provided with a "clear and certain remedy" for the state's unconstitutional exaction of tax moneys.

This Court in 1920, again, reiterated its due process analysis when it ordered a refund of taxes paid when a taxing scheme was ruled unconstitutional. In *Ward v. Love County Board of Comm'rs*, 253 U.S. 17 (1920), members of the Choctaw tribe filed a refund suit to recover moneys collected from them by Love County, Oklahoma as taxes on their allotments, which under the laws and Constitution of the United States were nontaxable. In reversing the Oklahoma Supreme Court's refusal to award a refund for the unlawful tax this Court stated:

> It is a well settled rule that 'money got through imposition' may be recovered back; . . . [and] [t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, . . .

Id. at 24 (citations omitted).

Eight years later this Court again applied the same Due Process analysis when it held that one forced to pay a tax in violation of a federal law is entitled, in addition to prospective relief, to a refund of the excess tax paid unless the disparity is removed in some other manner. *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928). In *Montana*, state officials had imposed a tax on shares of banks incorporated under federal law but not on shares of state-incorporated banks. The Montana National Bank of Billings paid this tax and then brought suit for a refund. On appeal, the Montana Supreme Court overruled a previous state court decision and held shares of state banks should be taxed in order to comply with a federal statute. Although the court ruled in favor of the Montana National Bank of Billings, it declined, however, to order a refund of the taxes paid. On writ of error, this Court acknowledged the Montana Supreme Court's prospective relief that ensured equal treatment of banks in the future. This Court expressed, however, that prospective relief alone would not satisfy the notions of the Fourteenth Amendment Due Process Clause. Justice Sutherland opined:

> It is true that the state supreme court in the present case expressly repudiated the construction therefore put by it upon the state statutes . . . and, . . . adopted one to the exact contrary. But that does not cure the mischief which had been done under the earlier construction. . . . Plaintiff in error cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it . . .

Id. at 504-505.

The following cases are similar to our case at hand. Each time the state had wished to keep the money wrongfully taken and had attempted to deprive the wronged parties of their rightful claim to a refund or other appropriate relief. These cases have demonstrated this Court's traditional analysis when determining a state's constitutional duty to provide relief to a party for its payment of an unconstitutional tax. "Because exaction of a tax constitutes a deprivation of property, the state must provide procedural safeguards against unlawful exaction in order to satisfy the commands of the Due Process Clause." *McKesson*, at 36 (footnote omitted).

In the instant case, Idaho has failed to provide the necessary procedural safeguards to satisfy due process. In fact, the Idaho Supreme Court has blocked any opportunity V-1 may have had in further challenging their tax obligation. They have stripped V-1 of their constitutional right to claim a refund or to avail themselves to other forms of relief. Without allowing for the opportunity to develop a sufficient record, brief, argue or present a refund/relief issue, the Idaho Supreme Court has effectively silenced V-1 before they have been given the opportunity to speak. The Supreme Court of Idaho has

disregarded the Fourteenth Amendment Due Process Clause and has turned its back on precedent established by this Court.[3]

Although the Idaho Supreme Court has ruled in a manner which is inconsistent with this Court's precedent and in total disregard of the Due Process Clause, it is more shocking that the court made these rulings *sua sponte*. V-1 was never given the opportunity to develop a record, brief or argue the issue of a refund or other appropriate relief.

II.

THE IDAHO SUPREME COURT'S *SUA SPONTE* RULING ON THE REFUND/RELIEF ISSUE IS A VIOLATION OF THE DUE PROCESS CLAUSE BECAUSE THE RULING DENIED V-1 THE OPPORTUNITY TO BRIEF AND ARGUE THE ISSUE, IS CONTRARY TO REGULARIZED AND ORDERLY JUDICIAL PROCESS, AND IGNORES STATUTORY AND CONSTITUTIONAL PROVISIONS, THEREFORE, THIS COURT SHOULD VACATE THE JUDGMENT AS TO THAT ISSUE AND REMAND FOR FURTHER PROCEEDINGS CONSISTENT WITH DUE PROCESS.

Early in this Nation's jurisprudence, this Court voiced the due process doctrine that "[w]herever one is assailed in his person or his property, there he may defend." *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). The Fourteenth Amendment stands for the fundamental principle that, as a matter of due

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3. It can be noted again that this Court's precedent was brought to the attention of the Idaho Supreme Court in V-1's Petition for Rehearing. However, this precedent was disregarded as evidenced by the court's denial out of hand of V-1's Petition for rehearing and issuance of the July 2, 1996 Substitute Opinion.

process, parties whose rights are to be affected are entitled to an opportunity to be heard. And although a precise definition of the Due Process Clause cannot be penned, Justice Jackson in 1950 asserted, "there can be no doubt that at a minimum [the words Due Process] require that deprivation of life, liberty or property by adjudication be preceded by notice*and opportunity for a hearing* appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950) (emphasis added). In the instant case, the Supreme Court of Idaho has ignored V-1's fundamental right to be heard by ruling on an issue, *sua sponte,* without allowing for notice, presentation of evidence below, briefs of authorities or an opportunity to be heard. In so doing, the Idaho Supreme Court has deprived V-1 of their right to a refund or other relief in regards to unconstitutionally exacted taxes in excess of 50 million dollars. (Appendix F, 78a).

In March of 1992, V-1 filed a complaint in the district Court of the Seventh Judicial District of the State of Idaho seeking a reimbursement for fees paid under the Clean Water Trust Fund Act. V-1 argued the transfer fee was actually a fuel tax in violation of Article VII, § 17 of the Idaho Constitution. V-1 moved for and was granted a partial summary judgment. The district court agreed that the transfer fee was effectively a tax and in violation of the Idaho Constitution (Appendix C, p.38a; Appendix A, p. 7a). However, the district court held that the record was not sufficient to determine, as a matter of law, what remedy was available to V-1. Respondent, Trust Fund, sought and was granted permission to appeal the district court's partial summary judgment.

In the opinion issued on August 3, 1995, the Idaho Supreme Court affirmed the district court and the unconstitutionality of the transfer fee was settled. V-1's refund/relief issue was properly left for the trial court. On rehearing, the Idaho

Supreme Court issued a second opinion on April 16, 1996 which substantially reincorporated all of its earlier opinion except that the court had inserted a new paragraph IV entitled, V-1 OIL IS NOT ENTITLED TO A REFUND. However, the trial court never ruled on that issue, V-1's entitlement to a refund was never briefed, argued or presented as an issue on appeal. Despite these inadequacies, the court disposed of the substance of the refund issue in summary fashion. Finally, after denying V-1's petition for rehearing, the Idaho Supreme Court issued a substitute opinion which reiterated the April 16, 1996 holding.

V-1's entitlement to a refund was never an issue on appeal. The trial court never ruled on that issue, recognizing that there were contested issues of fact and difficult legal issues involved in the refund question. The only issue decided by the district court's partial summary judgment was its holding that the petroleum transfer fee was, in effect, an excise tax on motor fuels which violated Article VII, § 17 of the Idaho Constitution. In fact, the sole issue raised and certified for appeal under I.R.C.P. 54(b) was:

> Whether the district court erred in failing to construe Section 41-4908(7) as imposing a constitutionally permissible charge reasonably related to the pollution liability insurance services made available by the trust fund to licensed petroleum distributors and their customers?

(Opening Brief of Appellant, p.8 - Appendix H, 99a).

The Idaho Supreme Court has also clearly acknowledged that "the sole issue before this court is whether the transfer fee is a tax on motor vehicle fuels." (Appendix A, 12a). That was the

only issue which was briefed and argued by the parties; there was never any discussion or analysis of V-1's entitlement to a refund. By ruling on this refund/relief issue *sua sponte*, the Idaho Supreme Court has denied V-1 a meaningful opportunity to be heard and has scoffed at the procedure within our judicial system that prides itself on fair and impartial operation.

The right to due process, at its core, reflects a fundamental scheme of regularized, orderly process. It is this process that gives those persons, like V-1, who are forced to settle their claims of right through the judicial process a sense of comfort that they will be given the opportunity to be heard before a final determination of their rights. As Justice Harlan so passionately stated:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an *orderly, predictable* manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society.

Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (emphasis added). It is this common-law model that the American society has rested its "systematic definition of individual rights and duties, as well as its machinery for dispute settlement." *Id.* at

375. Without this due process of law, the State's control over methods for binding conflict resolution would be ineffectual. By providing for, and enforcing, this social and legal framework society can count on a regularized, orderly process of dispute settlement. "It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle." *Id.*

The Idaho Supreme Court has deviated from this regularized and orderly system of dispute resolution and, in so doing, has violated V-1's due process rights. Specifically, by ruling on the refund/relief issue that was reserved for the trial court, the Idaho Supreme Court has denied V-1 the right to brief and cite authorities in support or to argue their claim for a refund or other relief for the unconstitutional taxes exacted from them. In short, the court's *sua sponte* ruling has stripped V-1 of their property claim without the opportunity for a hearing.

It is commonly known that a state may regulate the procedure of its courts in accordance with its own conception of policy and fairness. *Patterson v. New York*, 432 U.S. 197 (1977). However, as in this case, when the highest state court deviates from the notions of fairness there must be an avenue for relief to protect those property rights in jeopardy. It is evident that the Idaho Supreme Court has turned its back on due process and on notions of fairness within its own judicial system. On several occasions, the Idaho Supreme Court has made it explicit that they will not review an issue which neither party raised or argued in their briefs. *State v. Hoisington*, 657 P.2d 17 (Idaho 1983). "This Court has consistently followed the rule that it will not review the actions of a district court which have not been specifically assigned as error[,] [e]specially where there are no authorities cited nor argument contained in the briefs upon the question." *Id.* at 23 (citations omitted).

Further, the Supreme Court of Idaho has held that it will not review the actions of a trial court unless the action has been listed as an issue on appeal, especially where no authorities are cited and no argument is contained in the appellate briefs. *Sun Valley Shopping CTR. v. Idaho Power*, 803 P.2d 993 (Idaho 1991); *see Northcutt v. Sun Valley Co.*, 787 P.2d 1159 (Idaho 1990); *Sandpoint Convalescent v. Dept. of Health*, 756 P.2d 398 (Idaho 1988). Finally, even the Idaho Court of Appeals has recognized the inherent unfairness of a *sua sponte* ruling. *State v. Langdon*, 785 P.2d 679 (Idaho Ct.App.1990). "Where, as here, the order has been entered *sua sponte*, without prior notice and opportunity to be heard or to respond by memorandum, concerning the reason for a contemplated dismissal, we think justice requires an opportunity to seek the court's reconsideration." *Id.* at 681. Even with this case precedent to reflect upon, the Idaho Supreme Court insisted on taking a course of procedure that skewed away from the regular and orderly procedure which is characteristic of due process.

There are some exceptions that allow a court to stray from its ordinary procedures without violating the fundamental notions of due process. For example, a state can enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance. *Windsor v. McVeigh*, 93 U.S. at 278. Similarly, a state accords due process when it terminates a claim for failure of a party to comply with a reasonable procedural or evidentiary rule necessary for orderly adjudication. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909). However, none of the circumstances which allow for a court to stray from its traditional procedures existed here. In fact, the court has given no authority or reasoning to support their *sua sponte* ruling and has not offered authoritative support as to why V-1 is precluded from any type of relief/refund. In support, the Idaho Supreme Court has meagerly stated that the legislature had the authority to levy a

tax on motor vehicle fuels and that it was the appropriation of the moneys from the taxing scheme that was unconstitutional, and not the creation and collection of the transfer fee. (Appendix A, 12a).

By ruling on the refund/relief issue *sua sponte*, the Idaho Supreme Court has highlighted significant statutory and legal issues which, because of their difficult nature, ought not have been addressed without the issues having been raised, briefed and argued by the parties. First, while the court's opinion does not directly state that the Idaho Tax Commission can continue to collect the one cent per gallon "transfer fee" as an excise tax on motor fuels, the court's July 2, 1996 opinion is being construed to mean that the one cent per gallon fee is still collectible as an excise tax on motor fuels because the language of the court's opinion states that "it is uncontested that the legislature had the authority to levy a tax on motor fuels." (Appendix A, 12a). This result is contrary to several statutes and constitutional provisions enacted by the Idaho legislature.

In Idaho Code Title 63, Chapter 24, the legislature provided for the only, 21 cent per gallon, excise tax on motor fuel. (I.C. § 63-2405, Appendix I). Specifically, the legislature was clear and unambiguous that it did not want any other excise taxes on motor fuels when it enacted I.C. § 63-2431, which provides:

> *The taxes imposed* by this chapter *shall be in lieu of all other excise taxes, license fees or property taxes* imposed upon gasoline, aircraft engine fuel or special fuels by this state or any political subdivision of this state.

(Emphasis added) (Appendix I, p. 104a). As the court's opinion

reads today, the Idaho Supreme Court has disregarded the legislature's intent and has unilaterally and unconstitutionally imposed another one cent per gallon excise tax on motor fuels. Next, if we examine that the Clean Water Trust Fund Act as a whole, it is clear that the legislature did not intend that the transfer fee imposed in I.C. § 41-4908(7) (Appendix I, p. 107a) to be anything other than a source of funding for the underground storage tank insurance program. In I.C. § 41-4914 (Appendix I) the legislature declared that, "[a]ll moneys which may come into the Idaho Petroleum Clean Water Trust Fund are hereby perpetually appropriated to the manager of the State Insurance Fund as Trustee . . ." There is no intimation that the legislature would have intended the one cent transfer fee to be upheld as an additional one cent tax on motor fuel in the event the fee was found unconstitutional. I.C. § 63-2431 expressly prohibits any other excise taxes or license fees on motor fuels.

The third procedural problem with the Idaho Supreme Court's holding on the relief/refund issue is that the court attempts to reapportion the moneys in violation of I.C. § 67-3511(2) (Appendix I, p. 109a) which states, in part, "Legislative appropriations shall not be transferred from one fund to another unless *expressly* approved by the legislature." (emphasis added). In addition, the holding is in conflict with Article VII, § 13 of the Idaho Constitution which provides that "No money shall be drawn from the treasury, but in pursuance of appropriations made by law." Therefore, the court could have voided the transfer fee because it was unconstitutional, but the fee cannot be transmuted into an excise tax on motor fuels. Not only has the court disregarded the above mentioned constitutional and statutory provisions, but it has also ignored case precedent which has generally held that funds cannot be constitutionally transferred from one funding program to another. *See George v. Donovan*, 757 P.2d 651 (Idaho 1988); *Idaho County Property Owners Assn. v. Syringa Gen. Hosp.*

Dist., 805 P.2d 1233 (Idaho 1991); *Epperson v. Howell*, 154 P. 621 (1918).

It also is important to note that even if the legislature had not stated that the 21 cent per gallon motor fuels tax was "in lieu of all other excise taxes and license fees" on motor fuels, the one cent transfer fee imposed in I.C. § 41-4908(7) is so integrally intertwined with the entire Clean Water Trust Fund Act that, under the standard established by this Court, the license fee cannot reasonably be severed from the Act. *Dorchy v. Kansas*, 264 U.S. 286 (1924). In *Dorchy*, this Court opined, after analyzing a state statutory scheme providing for compulsory arbitration of industrial disputes, that:

> [a] statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad. But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall.

Id. at 289-290.

The transfer fee is integrally intertwined in the Trust Fund in several ways. I.C. § 41-4908(10)(Appendix I, p. 108a) provides that:

> The director [of the Clean Water Trust Fund] shall certify to the [Tax] commission when the unencumbered balance in the trust fund equals thirty million dollars ($30,000,000).

> Effective the first day of the second month following the date of such certification, the imposition of the transfer fee shall be suspended. Thereafter, the director shall certify to the commission when the unencumbered balance in the trust fund equals twenty million dollars ($20,000). Effective the first day of the second month following the date of such certification, the imposition of the transfer fee shall be reinitiated.

As an executive branch officer, the director has been given authority to suspend or reimpose the transfer fee. This control is an integral part of the Clean Water Trust Fund Act which cannot be ignored. Furthermore, the Trust Fund Act, by its own terms, requires that collections of the license fee cease when the unencumbered balance exceeds $50,000,000. If this Court had a factually developed record it would demonstrate that the State Tax Commission has collected over $50,000,000 since the inception of the transfer fee. (Appendix F). Since the license fee cannot constitutionally be collected to fund the trust fund insurance program, the effect of the Idaho Supreme Court's opinion is to unencumber all of the $50,000,000 collected to date. The Act would then require the collections to cease, which is inconsistent with treating the transfer fee as a motor fuels tax.

Finally, the court's *sua sponte* holding is contradictory to express statutory authority for V-1 Oil to claim a refund. I.C. § 63-2410(4) (Appendix I, p. 102a) provides:

> Any licensed distributor paying the gasoline tax . . . to the state of Idaho erroneously shall be allowed a credit or refund of the amount of tax paid by him if a written claim for

> refund is filed with the commission within three (3) years after the date those taxes were paid.

The court makes no reference to or analysis of that statute in Part IV of its opinion on rehearing.

The statements in Part IV of the Idaho Supreme Court's opinion on rehearing suggesting that the unconstitutional transfer fee can survive as a valid excise tax on motor fuels, are in direct violation of I.C. § 63-2431, and the clear intent expressed in the Clean Water Trust Fund Act. In effect, Part IV of the court's opinion has imposed an additional one cent excise tax on motor fuels. That result is contrary to the statutes and Idaho Constitution. And in reaching this result the Idaho Supreme Court has disregarded the due process rights of V-1, the orderly and regularized judicial procedures inherent in the Fourteenth Amendment, case precedent and constitutional and statutory provisions.

CONCLUSION

The Fourteenth Amendment is preemptory. It provides no state shall "deprive any person of life, liberty or property without due process of law . . ."

Given the incomplete record, statutory and constitutional contradiction, lack of authority, briefing and argument on the issue, it baffles common sense that the Idaho Supreme Court took it upon themselves to decide the relief/refund issue after it had been left for the trial court. Under *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), and its progeny, this court has specifically provided for a clear and certain remedy to taxpayers for a state's unlawful exaction of tax moneys pursuant to an unconstitutional scheme.

The Idaho Supreme Court has ignored this precedent, and in so doing, the court has erroneously and arbitrarily extinguished the rights of V-1 to make a legitimate property claim against the moneys wrongfully exacted from them under the unconstitutional tax scheme. We do not live in a system where a person's property rights can be so easily extinguished. V-1, without this Court's review, is without recourse and, with all other payees into the Trust Fund, has bestowed what is tantamount to a $50,000,000 gift to the state of Idaho.

As this Court has emphasized time and again, the Due Process Clause grants an aggrieved party the opportunity to present their case and have its merits fairly judged. No such opportunity has been provided to V-1. Here, the deprivation of V-1's claim for relief is final. Unlike a claimant whose charge is dismissed on the merits for lack of evidence or whose claim is dismissed for failure to comply with procedural rules, V-1 cannot obtain further judicial review except to this Court. A system or procedure that deprives persons of their claims in a random manner, as is evident in the case here, cannot go uncorrected. Therefore it is imperative that this Court give V-1 the due p rocess opportunity it is entitled.

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF IDAHO DATED JULY 2, 1996

IN THE SUPREME COURT OF THE STATE OF IDAHO

1996 OPINION NO. 86

Docket No. 21222

V-1 OIL COMPANY,

Plaintiff-Respondent,

v.

IDAHO PETROLEUM CLEAN WATER TRUST FUND,

Defendant-Appellant.

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bonneville County. Hon. Ted V. Wood, District Judge.

Appeal from partial summary judgment declaring dedication of petroleum transfer fee to non-highway purposes unconstitutional. *Affirmed.*

Holland & Hart, Boise, for appellant. B. Newal Squyers argued.

Simpson, Gauchay & Gardner, Idaho Falls; Mofatt, Thomas, Barrett, Rock & Fields, Boise, for respondent. Robert E. Bakes, argued.

Appendix A

In response to a congressional mandate directing the upgrading and cleanup of underground petroleum storage tanks, the Idaho Legislature enacted the Clean Water Trust Fund Act. This act provide a trust fund for storage-tank liability insurance (Trust Fund). The Trust Fund is primarily funded through a transfer fee levied on the first licensed petroleum distributor to transfer title to petroleum in this state.

In March 1992, V-1 Oil Company (V-1 Oil) filed a complaint in district court seeking reimbursement for the fees it had paid under the Clean Water Trust Fund Act. V-1 Oil argued that the transfer fee is actually a gasoline tax, and the proceeds of the tax are not dedicated to highway maintenance and construction projects as required by Article VII, Section 17 of the Idaho Constitution.

V-1 Oil moved for and was granted a partial summary judgment. The district court agreed with V-1 Oil that the transfer fee is effectively a tax and the proceeds of that tax must be dedicated to highway construction or maintenance. The district court reserved ruling on the amount of the potential refund. Respondent, Trust Fund, sought and was granted permission to appeal the district court's partial summary judgment in favor of V-1 Oil. The Supreme Court granted petitions by Western Petroleum Marketers' Association and Idaho Highway Users, Incorporated, to appear as *amicus curiae* in this appeal. V-1 Oil seeks attorney fees on appeal under Idaho Code Section 12-117 and the private attorney general doctrine.

In an opinion issued on August 3, 1995, the Idaho Supreme Court affirmed the district court. The Supreme Court held that clearly the Legislature had the power to assess or impose the

"fee" but the Court further held that the fee assessed for transferring title to petroleum products is not a charge for services provided by the Trust Fund. The Supreme Court concluded that the transfer fee is a tax on gasoline and like motor vehicle fuels. Because Article VII, Section 17 of the Idaho Constitution requires that the proceeds of fuel taxes be dedicated exclusively to highway maintenance, construction, and supervision, the Supreme Court held that the proceeds of the fee cannot be allocated to the Trust Fund.

The Supreme Court rejected V-1 Oil's argument that V-1 Oil was entitled to attorney fees on appeal. Noting that the Trust Fund is not a "state agency" within the meaning of Idaho Code Section 12-117, the Court held that V-1 Oil could not recover attorney fees under the statute. The Supreme Court also denied V-1 Oil's claim for attorney fees under the private attorney general doctrine, noting that V-1 oil initiated and prosecuted this action in an attempt to recover the transfer fees it has paid.

On rehearing, the Idaho Supreme Court held that clearly the Legislature had the power to assess or impose the "fee" but the Court further held that the transfer fee is a tax on gasoline and like motor fuels, stating that "[t]he per-gallon transfer fee assessed for engaging in the privilege of delivering petroleum products in this state is not reasonably related to the benefits provided by the Trust Fund. The transfer fee is thus a tax." The Supreme Court held that V-1 Oil is not entitled to a refund of transfer fees that have been paid, noting that the transfer fee itself is not unconstitutional, but rather the appropriation of the revenue raised from the transfer fee is unconstitutional.

The Idaho Supreme Court has issued a substitute opinion for the Court's prior opinion dated April 16, 1996, which has

been withdrawn. The Court revised the lst sentence of section IV, which now states that "[t]he revenue raised from the imposition of the transfer fees must be appropriated by the Idaho Legislature for uses consistent with Article VII, Section 17 of the Idaho Constitution." In addition, the Court has added a new section V, titled "Applicability of this Opinion." In this new section V, the Court states that its opinion will be applied in a modified prospective fashion, applying the decision to the case before the Court, to all pending actions at the date of the Court's decision, and to all actions arising in the future. The Court specifically noted that its decision will not be retroactively applied to insurance policies issued by the Trust Fund, insurance reserves, or surplus existing prior to the Supreme Court's August 3, 1995 decision. The Supreme Court denied attorney fees on appeal.

Appendix A

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 21222

Boise, December 1995 Term

1996 Opinion No. 86

Filed: July 2, 1996

Frederick C. Lyon, Clerk

V-1 OIL COMPANY,

Plaintiff-Respondent,

v.

IDAHO PETROLEUM CLEAN WATER TRUST FUND,

Defendant-Appellant.

SUBSTITUTE OPINION
THE COURT'S PRIOR OPINION
DATED APRIL 16, 1996 IS
HEREBY WITHDRAWN

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bonneville County. Hon. Ted V. Wood, District Judge.

Appeal from partial summary judgment declaring dedication of petroleum transfer fee to non-highway purposes unconstitutional. *Affirmed.*

Holland & Hart, Boise, for appellant. B. Newal Squyers argued.

Simpson, Gauchay & Gardner, Idaho Falls; Mofatt, Thomas, Barrett, Rock & Fields, Boise, for respondent. Robert E. Bakes, argued.

ON REHEARING

McDEVITT, Chief Justice

I.
BACKGROUND AND FACTS

This case presents no disputed facts. V-1 Oil Company (V-1 Oil) is a distributor of petroleum products licensed to do business in Idaho. As to at least some of the petroleum products V-1 Oil sells in Idaho, V-1 Oil is the first licensed distributor to transfer the petroleum products within this state.[1] As the first licensed distributor to transfer title to a petroleum product in this state, V-1 Oil is required by the Idaho Petroleum Clean Water Act to pay a one cent per-gallon transfer fee on those petroleum products. The proceeds of that transfer fee are committed to the Idaho Petroleum Clean Water Trust Fund (Trust Fund), which insures the owners and operators of petroleum storage tanks who participate in the program against claims for personal injuries and property damage arising from the accidental release of petroleum from the storage tanks. V-1 Oil does not participate in the Trust Fund.

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1. The record establishes that V-1 Oil is both a primary and secondary distributor of petroleum products in this state. As discussed below, the district court denied V-1 Oil's motion for summary judgment on the issue of to what extent V-1 Oil was impacted by the imposition of the transfer fee.

Appendix A

On March 2, 1992, V-1 Oil filed a complaint in district court against the Trust Fund, seeking an order that the petroleum transfer fee charged under the Idaho Petroleum Clean Water Trust Fund Act, I.C. § 41-4908(7), constitutes a gasoline tax. Because the Idaho Constitution requires that the proceeds of any tax on gasoline be dedicated exclusively to the construction, repair, maintenance, and traffic supervision of the public highways of this state, V-1 Oil sought to obtain a refund of the "fees" it had paid and to have the fee declared unconstitutional under Article VII, Section 17 of the Idaho Constitution. V-1 Oil filed a motion for summary judgment on both the constitutionality of the transfer fee and V-1 Oil's entitlement to a refund of those fees it has paid. The Trust Fund filed a cross motion for summary judgment on the constitutionality of the transfer fee.

On December 13, 1993, the district court issued a memorandum decision and order granting V-1 Oil's motion in part and denying the Trust Fund's motion. The district court concluded that the petroleum transfer fee is, in effect, a gasoline tax. Because the proceeds of that tax are not dedicated to the construction and maintenance of highways as required by the Idaho Constitution, the district court held that the tax was unconstitutional under Article VII, Section 17 of the Idaho Constitution. The district court also held that the record was not sufficient to determine, as a matter of law, what remedy was available to V-1 Oil. The Trust Fund sought and was granted permission to appeal the partial summary judgment. The Trust Fund argues on appeal that the district court erred in concluding that the transfer fee constitutes a "tax on gasoline and like motor vehicle fuels" under the Idaho Constitution Article VII, Section 17. V-1 Oil seeks attorney fees on appeal.

Appendix A

II.
STANDARD OF REVIEW

When reviewing a district court's ruling on a motion for summary judgment, this Court liberally construes the record in favor of the party opposing the motion, resolving all inferences that reasonably can be drawn from the record in that party's favor. *E.g., Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994); *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994). This standard is not lessened because both parties have moved for summary judgment. *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 606, 888 P.2d 383, 385 (1995); *Kromrei v. AID Ins. Co.*, 110 Idaho 549, 551, 716 P.2d 1321, 1323 (1986). However, this Court has recently observed that "when both parties move for summary judgment on the same issues and legal theories based on the same, essentially uncontroverted facts, the record is unlikely to reveal genuine issue of material fact." *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 200, 899 P.2d 411, 413 (1995). When reviewing a district court's ruling on such motions, this Court must examine each motion separately, alternatively resolving the reasonable inferences presented by the record in opposition to each party's motion. *Id.* at 201, 899 P.2d at 414.

III.
THE TRANSFER FEE IMPOSED UNDER THE IDAHO CLEAN WATER TRUST FUND ACT IS A TAX ON GASOLINE AND LIKE MOTOR VEHICLE FUELS

The Idaho Constitution expressly provides that the proceeds of all gasoline taxes must be dedicated exclusively to the construction, repair, maintenance, and supervision of public

highways. Article VII, Section 17 of the Idaho Constitution provides:

> GASOLINE TAXES AND MOTOR VEHICLE REGISTRATION FEES TO BE EXPENDED ON HIGHWAYS. On and after July 1, 1941 the proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state . . . shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever.

Idaho Const. art. VII, § 17. This Court has held that this provision is unambiguous, and the plain meaning of this section prohibits the transfer of revenues collected from taxes on motor vehicle fuels to any purpose other than construction, repair, maintenance, and supervision of public highways. *Williams v. Swensen*, 93 Idaho 542, 544, 467 P.2d 1, 3 (1970) ("The plain meaning of Art. 7, § 17 of the Constitution is that all moneys collected from the enumerated sources must be used for the designated purpose and may not be diverted therefrom."); *State ex rel. Moon v. Jonasson*, 78 Idaho 205, 209-10, 299 P.2d 755, 757 (1956) ("The constitutional provision prohibiting the transferring of revenues specified therein to any other purpose than those enumerated is all inclusive; it was enacted by the people of the State. It is plain and unambiguous and is not

subject to the construction contended for by appellant."). Based upon our conclusion that there is no interpretation of the fund that would bring the fund within the purposes provided for in Article VII, Section 17 of the Idaho Constitution, the sole issue before this Court is whether the transfer fee is a tax on motor vehicle fuels.

The Trust Fund argues that the transfer fee is a charge imposed on those who participate in the storage tank insurance program. As such, the Trust Fund argues that the transfer fee is a fee charged to provide a service, rather than a tax on gasoline. In support of this proposition, the Trust Fund relies on *Kootenai County Property Ass'n v. Kootenai County,* 115 Idaho 676, 769 P.2d 553 (1989). In *Kootenai,* this Court held that an annual solid waste disposal fee was not a tax because that fee was "reasonably related to the services rendered by the county in acquiring, establishing, maintaining and operating its solid waste disposal system." *Id.* at 680, 769 P.2d at 557.

It is important to note at the outset that the prior cases in which this Court was required to determine whether a fee constituted a tax, involved municipal and county actions. In those cases, the question of whether the fee constituted a tax was relevant to the authority of the entity to assess the fee. In the present case, there is no dispute that the legislature has the authority to levy a tax on motor vehicle fuels, and the significance of whether the petroleum transfer fee constitutes a tax is relevant only to whether the proceeds of that fee must be dedicated to the purposes required under Article VII, Section 17 of the Idaho Constitution.[2]

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2. Although there is no dispute that the legislature is authorized to assess and collect the fee at issue in this appeal, V-1 Oil's standing to challenge the constitutionality of the way in which the proceeds of that fee are spent has not been challenged by the Trust Fund and therefore will not be resolved by this Court on appeal.

Appendix A

In order for the transfer fee to be a "fee for service" under *Kootenai,* the fees collected must bear a reasonable relationship to the service provided to those paying the fee. In the present case, however, the transfer fee is not related to participation in or the opportunity to participate in the Trust Fund's insurance program. The fee is charged to the first licensed petroleum distributor to transfer title to petroleum in Idaho "for the privilege of engaging in the delivery or storage of petroleum products[,]" I.C. § 41-4908(7), not for participating in the Trust Fund's insurance program.

This case is not analogous to *Kootenai,* where everyone who paid the solid waste disposal fee was entitled to the benefit of solid waste disposal services. Eligibility to participate in the insurance program is not related to payment of the transfer fee. Distributors who do not store petroleum in storage tanks in Idaho are required to pay the transfer fee although they do not participate in the insurance program, while people and entities who store petroleum in storage tanks but are not licensed petroleum distributors are entitled to participate in the Trust Fund's insurance program without paying the fee. During oral argument, counsel for both parties confirmed that persons or entities are required to pay the transfer fee who cannot participate in the Trust Fund.

The per-gallon transfer fee assessed for engaging in the privilege of delivering petroleum products in this state is not reasonably related to the benefits provided by the Trust Fund. The transfer fee is thus a tax. *Kootenai County Property Ass'n,* 115 Idaho at 680, 769 P.2d at 557 ("The law only requires that the fee be reasonably related to the benefit conveyed.").

The parties do not dispute that the transfer fee is levied, in

part, on "gasoline and like motor vehicle fuels" within the meaning of Article VII, Section 17 of the Idaho Constitution. The Idaho Petroleum Clean Water Act defines the terms "petroleum" and "petroleum products" to expressly include "motor gasoline, gasohol, other alcohol blended fuels, diesel fuel, heating oil and aviation fuel." I.C. § 41-4903(23). Moreover, according to the affidavits submitted by V-1 Oil, the only petroleum products relevant to this appeal are diesel fuel and gasoline.

To the extent that the petroleum transfer fee has been assessed against "gasoline and like motor vehicle fuels[,]" the allocation of the proceeds of that fee to fund the Trust Fund violates Article VII, Section 17 of the Idaho Constitution.

IV.
V-1 OIL IS NOT ENTITLED TO A REFUND

Although we agree with V-1 Oil that the revenue raised from the imposition of the transfer fee cannot constitutionally be used to finance the Trust Fund, we do not agree that V-1 Oil is entitled to a refund. It is uncontested that the legislature had the authority to levy a tax on motor vehicle fuels. The creation and collection of the transfer fee was not unconstitutional pursuant to Article VII, Section 17 of the Idaho Constitution, but rather the appropriation of the revenue, raised from the transfer fee, to the Trust Fund was unconstitutional. Article VII, Section 17 of the Idaho Constitution mandates that all revenue raised from any tax on gasoline, the transfer fee in this case, must go toward the construction, repair, maintenance, and traffic supervision of the public highways. V-1 Oil is not entitled to a refund of the transfer fees it has paid, based upon our holding that the transfer fee was not unconstitutional and that the appropriation of the

transfer fees to the Trust Fund was unconstitutional. The revenue raised from the imposition of the transfer fees must be appropriated by the Idaho Legislature for uses consistent with Article VII, Section 17 of the Idaho Constitution.

V.
APPLICABILITY OF THIS OPINION

Since this action involves an interpretation of a statute, the result of which is to declare the appropriation of the proceeds of the transfer fee to be for an unconstitutional purpose, the question of the applicability of this Court's opinion to past, pending and future cases must be addressed.

In *Thompson v. Hagan*, 96 Idaho 19, 523 P.2d 1365 (1974), this Court set forth three different approaches for determining the applicability of an opinion of this Court. *Thompson*, 96 Idaho at 25, 523 P.2d at 1371. The *Thompson* Court adopted three criteria for determining which approach would be appropriate for a given case. *Id.* Under the first criteria, the purpose of the new decision must be analyzed in connection with the question of retroactivity. *Id.* The second criteria is reliance on the prior rule of law or the statutory procedure. *Id.* the third criteria is the effect on the administration of justice, that is, the number of cases that would be reopened if the decision was applied retroactively. *Id.*

Subsequently, in *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 25-26, 539 P.2d 566, 577-78 (1975), *Baker v. Shavers, Inc.*, 117 Idaho 696, 697, 791 P.2d 1275, 1276 (1990), and *Potlatch Corp. v. Idaho State Tax Comm'n*, 120 Idaho 1, 2-3, 813 P.2d 340, 341-42 (1991), this Court further defined and applied the criteria adopted in *Thompson*.

Appendix A

The purpose of this decision is to determine the constitutionality of the appropriation of the proceeds of the transfer fee imposed by the legislature. We recognize the reliance on the statute at issue by the Executive Department of the state in creating the insurance process contemplated by the Idaho Petroleum Clean Water Act and the service it provided in insuring hundreds of individuals and companies, who, in reliance on this insurance program, installed or maintained storage tanks. The expenditure by the State of Idaho of a significant portion of the funds collected in claims and administration of the Trust Fund is very compelling. The effect of this decision on the administration of justice is slight based upon the representation made to this Court that following this Court's August 3, 1995 decision, the transfer fee funds collected have not been expended and have been held in a separate account by the Idaho State Tax Commission.

As in *Thompson*, this Court finds that the factor of reliance on the constitutionality of the funds appropriated and the past issuance of policies, which will produce claims and losses in the future, and the reliance of significant number of individuals and enterprises on the existence of that insurance, is very strong. Therefore, this Court applies the decision adopted in this case in a modified prospective fashion, applying the decision to the case before the Court, to all pending actions at the date of the Court's decision, and to all actions arising in the future. This case will not be retroactively applied to insurance policies issued by the Trust Fund, insurance reserves, or surplus existing prior to this Court's August 3, 1995 decision.

VI.
V-1 OIL IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL

V-1 Oil seeks attorney fees on appeal under I.C. § 12-117 and the private attorney general doctrine. I.C. § 12-117 is inapplicable. The Trust Fund is not a state agency within the meaning of I.C. § 67-5201, which is incorporated into I.C. § 12-117 by reference. I.C. § 12-117(4)(b). The definition provided by I.C. § 67-5201 provides that an "agency" is "each state board, commission, department or officer authorized by law to make rules or to determine contested cases . . . ." I.C. § 67-5201(2) The Trust Fund has no power to promulgate rules or decide contested cases, and is not an agency subject to attorney fees under I.C. § 12-117.

We also reject V-1 Oil's invitation to award attorney fees under the private attorney general doctrine. In *Hellar v. Cenarrusa,* 106 Idaho 571, 682 P.2d 524 (1984), this Court adopted a three-factor test to determine whether attorney fees should be awarded under the private attorney general doctrine. When making such a determination, this Court must consider (1) the strength of the societal importance of the public policy vindicated by the litigation; (2) the need for private enforcement and the magnitude of the resultant burden on the plaintiff; and (3) the number of people standing to benefit from the decision sought. *Id.* at 577-78, 682 P.2d at 530-31; *see also Miller v. Echohawk,* 126 Idaho 47, 49, 878 P.2d 746, 748 (1994) (applying *Hellar* test to review award of fees under private attorney general doctrine).

V-1 Oil filed a complaint in district court seeking a refund of all funds paid by V-1 Oil pursuant to the Idaho Petroleum

Trust Fund Act. Regardless of whether V-1 Oil is entitled to such a refund, the record of the proceedings below and the arguments presented to this Court clearly establish that V-1 Oil initiated and has pursued this litigation for the limited purpose of obtaining a refund of the fees it has paid into the Trust Fund. As such, we conclude that V-1 Oil is not entitled to an award of attorney fees under the private attorney general doctrine.

VII.
CONCLUSION

The district court's order granting partial summary judgment in favor of V-1 Oil and denying the Trust Fund's motion for summary judgment is affirmed. The issue of whether V-1 Oil is entitled to a refund is not remanded to the district court, as we hold that V-1 Oil is not entitled to a refund of the transfer fees it has paid. This Court's decision will be applied in a modified prospective fashion. Costs to respondent; no attorney fees are awarded on appeal.

Justices TROUT, SILAK and SCHROEDER, **CONCUR**.

Justice JOHNSON, **CONCURRING IN THE RESULT**.

I concur in the result reached in the Court's opinion. In doing so, I announce that I consider the opinion in this case effectively to overrule *Kootenai County Property Ass'n v. Kootenai County.*, 115 Idaho 676, 769 P.2d 553 (1989).

The Court's opinion attempts to distinguish *Kootenai* by stating that in *Kootenai* "everyone who paid the solid waste disposal fee entitled to the benefit of solid waste disposal services," while in this case, "[e]ligibility to participate in the

insurance program is not related to payment of the transfer fee." Slip. op 5. In my view, this attempted distinction is not valid.

In *Kootenai,* the Court held that because any owner of a habitable residential dwelling was eligible to use the county waste disposal site, the charge imposed on them was a fee and not a tax. 115 Idaho at 678, 769 P.2d at 555. The essence of this logic was that it was up to the owner whether they chose to send their solid waste, if they had any, to the county waste disposal site. In the present case, anyone who pays the transfer fee is eligible to participate in the Trust Fund's insurance program, if they choose to have storage tanks, as V-1 has. In *Kootenai,* only those who chose to use the county waste disposal site received a benefit. Here, only those who choose to have storage tanks benefit. Having disagreed with the Court in *Kootenai,* and having attempted without success to convince the Court that *Kootenai* controlled, I now enthusiastically accept what I consider to be the demise of *Kootenai* as precedent. "It is said that there is nothing so dangerous to the status quo as an idea whose time has come. More dangerous yet is the continuance of an idea whose time has past." *Olsen v. Olsen,* 98 Idaho 10, 21, 557 P.2d 604, 615 (1976) (Shepard J., dissenting).

APPENDIX B — OPINION OF THE SUPREME COURT OF THE STATE OF IDAHO DATED APRIL 16, 1996

IN THE SUPREME COURT OF THE STATE OF IDAHO

1996 OPINION NO. 40

Docket No. 21222

V-1 OIL COMPANY,

Plaintiff-Respondent,

v.

IDAHO PETROLEUM CLEAN WATER TRUST FUND,

Defendant-Appellant.

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bonneville County. Hon. Ted V. Wood, District Judge.

Appeal from partial summary judgment declaring dedication of petroleum transfer fee to non-highway purposes unconstitutional. *Affirmed.*

Holland & Hart, Boise, for appellant. B. Newal Squyers argued.

Simpson, Gauchay & Gardner, Idaho Falls; Mofatt, Thomas, Barrett, Rock & Fields, Boise, for respondent. Robert E. Bakes, argued.

Appendix B

In response to a congressional mandate directing the upgrading and cleanup of underground petroleum storage tanks, the Idaho Legislature enacted the Clean Water Trust Fund Act. This act provide a trust fund for storage-tank liability insurance (Trust Fund). The Trust Fund is primarily funded through a transfer fee levied on the first licensed petroleum distributor to transfer title to petroleum in this state.

In March 1992, V-1 Oil Company (V-1 Oil) filed a complaint in district court seeking reimbursement for the fees it had paid under the Clean Water Trust Fund Act. V-1 Oil argued that the transfer fee is actually a gasoline tax, and the proceeds of the tax are not dedicated to highway maintenance and construction projects as required by Article VII, Section 17 of the Idaho Constitution.

V-1 Oil moved for and was granted a partial summary judgment. The district court agreed with V-1 Oil that the transfer fee is effectively a tax and the proceeds of that tax must be dedicated to highway construction or maintenance. The district court reserved ruling on the amount of the potential refund. Respondent, Trust Fund, sought and was granted permission to appeal the district court's partial summary judgment in favor of V-1 Oil. The Supreme Court granted petitions by Western Petroleum Marketers' Association and Idaho Highway Users, Incorporated, to appear as *amicus curiae* in this appeal. V-1 Oil seeks attorney fees on appeal under Idaho Code Section 12-117 and the private attorney general doctrine.

In an opinion issued on August 3, 1995, the Idaho Supreme Court affirmed the district court. The Supreme Court held that clearly the Legislature had the power to assess or impose the

"fee" but the Court further held that the fee assessed for transferring title to petroleum products is not a charge for services provided by the Trust Fund. The Supreme Court concluded that the transfer fee is a tax on gasoline and like motor vehicle fuels. Because Article VII, Section 17 of the Idaho Constitution requires that the proceeds of fuel taxes be dedicated exclusively to highway maintenance, construction, and supervision, the Supreme Court held that the proceeds of the fee cannot be allocated to the Trust Fund.

The Supreme Court rejected V-1 Oil's argument that V-1 Oil was entitled to attorney fees on appeal. Noting that the Trust Fund is not a "state agency" within the meaning of Idaho Code Section 12-117, the Court held that V-1 Oil could not recover attorney fees under the statute. The Supreme Court also denied V-1 Oil's claim for attorney fees under the private attorney general doctrine, noting that V-1 oil initiated and prosecuted this action in an attempt to recover the transfer fees it has paid.

On August 24, 1995, the Idaho Petroleum Clean Water Trust Fund filed a petition for rehearing, which was granted by the Idaho Supreme Court on September 25, 1995. In support of its petition for rehearing, the Idaho Petroleum Clean Water Trust Fund argued that the majority opinion in this case failed to apply the fundamental rules of statutory construction, which require a court to construe a statute with every presumption in favor of its constitutionality. The Idaho Petroleum Clean Water Trust Fund contended that the majority opinion failed to follow Idaho precedent for analyzing whether a fee will be considered a "tax" or a "fee," and after determining it was a tax, failed to consider whether the Idaho Petroleum Clean Water Trust Fund was within the purposes of Article VII, Section 17 of the Idaho Constitution.

Appendix B

On rehearing, the Idaho Supreme Court held that clearly the Legislature had the power to assess or impose the "fee" but the Court further held that the transfer fee is a tax on gasoline and like motor fuels, stating that "[t]he per-gallon transfer fee assessed for engaging in the privilege of delivering petroleum products in this state is not reasonably related to the benefits provided by the Trust Fund. The transfer fee is thus a tax." The Supreme Court ruled that V-1 Oil is not entitled to a refund of transfer fees that have been paid, noting that the transfer fee itself is not unconstitutional, but rather the appropriation of the revenue raised from the transfer fee is unconstitutional. The Supreme Court concluded that "[t]he revenue raised from the imposition of the transfer fees must be appropriated to the Idaho Department of Transportation, for uses consistent with Article VII, Section 17 of the Idaho Constitution." The Supreme Court denied attorney fees on appeal.

Appendix B

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 21222

Boise, December 1995 Term

1996 Opinion No. 40

Filed: April 16, 1996

Frederick C. Lyon, Clerk

V-1 OIL COMPANY,

Plaintiff-Respondent,

v.

IDAHO PETROLEUM CLEAN WATER TRUST FUND,

Defendant-Appellant.

SUBSTITUTE OPINION
THE COURT'S PRIOR OPINION
DATED AUGUST 3, 1996 IS
HEREBY WITHDRAWN

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bonneville County. Hon. Ted V. Wood, District Judge.

Appeal from partial summary judgment declaring dedication of petroleum transfer fee to non-highway purposes unconstitutional. *Affirmed.*

Holland & Hart, Boise, for appellant. B. Newal Squyers argued.

Simpson, Gauchay & Gardner, Idaho Falls; Mofatt, Thomas, Barrett, Rock & Fields, Boise, for respondent. Robert E. Bakes, argued.

ON REHEARING

McDEVITT, Chief Justice

I.
BACKGROUND AND FACTS

This case presents no disputed facts. V-1 Oil Company (V-1 Oil) is a distributor of petroleum products licensed to do business in Idaho. As to at least some of the petroleum products V-1 Oil sells in Idaho, V-1 Oil is the first licensed distributor to transfer the petroleum products within this state.[1] As the first licensed distributor to transfer title to a petroleum product in this state, V-1 Oil is required by the Idaho Petroleum Clean Water Act to pay a one cent per-gallon transfer fee on those petroleum products. The proceeds of that transfer fee are committed to the Idaho Petroleum Clean Water Trust Fund (Trust Fund), which insures the owners and operators of petroleum storage tanks who participate in the program against claims for personal injuries and property damage arising from the accidental release of petroleum from the storage tanks. V-1 Oil does not participate in the Trust Fund.

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1. The record establishes that V-1 Oil is both a primary and secondary distributor of petroleum products in this state. As discussed below, the district court denied V-1 Oil's motion for summary judgment on the issue of to what extent V-1 Oil was impacted by the imposition of the transfer fee.

Appendix B

On March 2, 1992, V-1 Oil filed a complaint in district court against the Trust Fund, seeking an order that the petroleum transfer fee charged under the Idaho Petroleum Clean Water Trust Fund Act, I.C. § 41-4908(7), constitutes a gasoline tax. Because the Idaho Constitution requires that the proceeds of any tax on gasoline be dedicated exclusively to the construction, repair, maintenance, and traffic supervision of the public highways of this state, V-1 Oil sought to obtain a refund of the "fees" it had paid and to have the fee declared unconstitutional under Article VII, Section 17 of the Idaho Constitution. V-1 Oil filed a motion for summary judgment on both the constitutionality of the transfer fee and V-1 Oil's entitlement to a refund of those fees it has paid. The Trust Fund filed a cross motion for summary judgment on the constitutionality of the transfer fee.

On December 13, 1993, the district court issued a memorandum decision and order granting V-1 Oil's motion in part and denying the Trust Fund's motion. The district court concluded that the petroleum transfer fee is, in effect, a gasoline tax. Because the proceeds of that tax are not dedicated to the construction and maintenance of highways as required by the Idaho Constitution, the district court held that the tax was unconstitutional under Article VII, Section 17 of the Idaho Constitution. The district court also held that the record was not sufficient to determine, as a matter of law, what remedy was available to V-1 Oil. The Trust Fund sought and was granted permission to appeal the partial summary judgment. The Trust Fund argues on appeal that the district court erred in concluding that the transfer fee constitutes a "tax on gasoline and like motor vehicle fuels" under the Idaho Constitution Article VII, Section 17. V-1 Oil seeks attorney fees on appeal.

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II.
STANDARD OF REVIEW

When reviewing a district court's ruling on a motion for summary judgment, this Court liberally construes the record in favor of the party opposing the motion, resolving all inferences that reasonably can be drawn from the record in that party's favor. *E.g., Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994); *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994). This standard is not lessened because both parties have moved for summary judgment. *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 606, 888 P.2d 383, 385 (1995); *Kromrei v. AID Ins. Co.*, 110 Idaho 549, 551, 716 P.2d 1321, 1323 (1986). However, this Court has recently observed that "when both parties move for summary judgment on the same issues and legal theories based on the same, essentially uncontroverted facts, the record is unlikely to reveal genuine issue of material fact." *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 200, 899 P.2d 411, 413 (1995). When reviewing a district court's ruling on such motions, this Court must examine each motion separately, alternatively resolving the reasonable inferences presented by the record in opposition to each party's motion. *Id.* at 201, 899 P.2d at 414.

III.
THE TRANSFER FEE IMPOSED UNDER THE IDAHO CLEAN WATER TRUST FUND ACT IS A TAX ON GASOLINE AND LIKE MOTOR VEHICLE FUELS

The Idaho Constitution expressly provides that the proceeds of all gasoline taxes must be dedicated exclusively to the construction, repair, maintenance, and supervision of public

highways. Article VII, Section 17 of the Idaho Constitution provides:

> GASOLINE TAXES AND MOTOR VEHICLE REGISTRATION FEES TO BE EXPENDED ON HIGHWAYS. On and after July 1, 1941 the proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state . . . shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever.

Idaho Const. art. VII, § 17. This Court has held that this provision is unambiguous, and the plain meaning of this section prohibits the transfer of revenues collected from taxes on motor vehicle fuels to any purpose other than construction, repair, maintenance, and supervision of public highways. *Williams v. Swensen*, 93 Idaho 542, 544, 467 P.2d 1, 3 (1970) ("The plain meaning of Art. 7, § 17 of the Constitution is that all moneys collected from the enumerated sources must be used for the designated purpose and may not be diverted therefrom."); *State ex rel. Moon v. Jonasson*, 78 Idaho 205, 209-10, 299 P.2d 755, 757 (1956) ("The constitutional provision prohibiting the transferring of revenues specified therein to any other purpose than those enumerated is all inclusive; it was enacted by the people of the State. It is plain and unambiguous and is not

subject to the construction contended for by appellant."). Based upon our conclusion that there is no interpretation of the fund that would bring the fund within the purposes provided for in Article VII, Section 17 of the Idaho Constitution, the sole issue before this Court is whether the transfer fee is a tax on motor vehicle fuels.

The Trust Fund argues that the transfer fee is a charge imposed on those who participate in the storage tank insurance program. As such, the Trust Fund argues that the transfer fee is a fee charged to provide a service, rather than a tax on gasoline. In support of this proposition, the Trust Fund relies on *Kootenai County Property Ass'n v. Kootenai County,* 115 Idaho 676, 769 P.2d 553 (1989). In *Kootenai,* this Court held that an annual solid waste disposal fee was not a tax because that fee was "reasonably related to the services rendered by the county in acquiring, establishing, maintaining and operating its solid waste disposal system." *Id.* at 680, 769 P.2d at 557.

It is important to note at the outset that the prior cases in which this Court was required to determine whether a fee constituted a tax, involved municipal and county actions. In those cases, the question of whether the fee constituted a tax was relevant to the authority of the entity to assess the fee. In the present case, there is no dispute that the legislature has the authority to levy a tax on motor vehicle fuels, and the significance of whether the petroleum transfer fee constitutes a tax is relevant only to whether the proceeds of that fee must be dedicated to the purposes required under Article VII, Section 17 of the Idaho Constitution.[2]

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2. Although there is no dispute that the legislature is authorized to assess and collect the fee at issue in this appeal, V-1 Oil's standing to challenge the constitutionality of the way in which the proceeds of that fee are spent has not been challenged by the Trust Fund and therefore will not be resolved by this Court on appeal.

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In order for the transfer fee to be a "fee for service" under *Kootenai*, the fees collected must bear a reasonable relationship to the service provided to those paying the fee. In the present case, however, the transfer fee is not related to participation in or the opportunity to participate in the Trust Fund's insurance program. The fee is charged to the first licensed petroleum distributor to transfer title to petroleum in Idaho "for the privilege of engaging in the delivery or storage of petroleum products[,]" I.C. § 41-4908(7), not for participating in the Trust Fund's insurance program.

This case is not analogous to *Kootenai*, where everyone who paid the solid waste disposal fee was entitled to the benefit of solid waste disposal services. Eligibility to participate in the insurance program is not related to payment of the transfer fee. Distributors who do not store petroleum in storage tanks in Idaho are required to pay the transfer fee although they do not participate in the insurance program, while people and entities who store petroleum in storage tanks but are not licensed petroleum distributors are entitled to participate in the Trust Fund's insurance program without paying the fee. During oral argument, counsel for both parties confirmed that persons or entities are required to pay the transfer fee who cannot participate in the Trust Fund.

The per-gallon transfer fee assessed for engaging in the privilege of delivering petroleum products in this state is not reasonably related to the benefits provided by the Trust Fund. The transfer fee is thus a tax. *Kootenai County Property Ass'n*, 115 Idaho at 680, 769 P.2d at 557 ("The law only requires that the fee be reasonably related to the benefit conveyed.").

The parties do not dispute that the transfer fee is levied, in

part, on "gasoline and like motor vehicle fuels" within the meaning of Article VII, Section 17 of the Idaho Constitution. The Idaho Petroleum Clean Water Act defines the terms "petroleum" and "petroleum products" to expressly include "motor gasoline, gasohol, other alcohol blended fuels, diesel fuel, heating oil and aviation fuel." I.C. § 41-4903(23). Moreover, according to the affidavits submitted by V-1 Oil, the only petroleum products relevant to this appeal are diesel fuel and gasoline.

To the extent that the petroleum transfer fee has been assessed against "gasoline and like motor vehicle fuels[,]" the allocation of the proceeds of that fee to fund the Trust Fund violates Article VII, Section 17 of the Idaho Constitution.

IV.
V-1 OIL IS NOT ENTITLED TO A REFUND

Although we agree with V-1 Oil that the revenue raised from the imposition of the transfer fee cannot constitutionally be used to finance the Trust Fund, we do not agree that V-1 Oil is entitled to a refund. It is uncontested that the legislature had the authority to levy a tax on motor vehicle fuels. The creation and collection of the transfer fee was not unconstitutional pursuant to Article VII, Section 17 of the Idaho Constitution, but rather the appropriation of the revenue, raised from the transfer fee, to the Trust Fund was unconstitutional. Article VII, Section 17 of the Idaho Constitution mandates that all revenue raised from any tax on gasoline, the transfer fee in this case, must go toward the construction, repair, maintenance, and traffic supervision of the public highways. V-1 Oil is not entitled to a refund of the transfer fees it has paid, based upon our holding that the transfer fee was not unconstitutional and that the appropriation of the

transfer fees to the Trust Fund was unconstitutional. The revenue raised from the imposition of the transfer fees must be appropriated by the Idaho Legislature for uses consistent with Article VII, Section 17 of the Idaho Constitution.

V.
V-1 OIL IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL

V-1 Oil seeks attorney fees on appeal under I.C. § 12-117 and the private attorney general doctrine. I.C. § 12-117 is inapplicable. The Trust Fund is not a state agency within the meaning of I.C. § 67-5201, which is incorporated into I.C. § 12-117 by reference. I.C. § 12-117(4)(b). The definition provided by I.C. § 67-5201 provides that an "agency" is "each state board, commission, department or officer authorized by law to make rules or to determine contested cases . . . ." I.C. § 67-5201(2) The Trust Fund has no power to promulgate rules or decide contested cases, and is not an agency subject to attorney fees under I.C. § 12-117.

We also reject V-1 Oil's invitation to award attorney fees under the private attorney general doctrine. In *Hellar v. Cenarrusa,* 106 Idaho 571, 682 P.2d 524 (1984), this Court adopted a three-factor test to determine whether attorney fees should be awarded under the private attorney general doctrine. When making such a determination, this Court must consider (1) the strength of the societal importance of the public policy vindicated by the litigation; (2) the need for private enforcement and the magnitude of the resultant burden on the plaintiff; and (3) the number of people standing to benefit from the decision sought. *Id.* at 577-78, 682 P.2d at 530-31; *see also Miller v. Echohawk,* 126 Idaho 47, 49, 878 P.2d 746, 748 (1994) (applying *Hellar* test to review award of fees under private attorney general doctrine).

Appendix B

V-1 Oil filed a complaint in district court seeking a refund of all funds paid by V-1 Oil pursuant to the Idaho Petroleum Trust Fund Act. Regardless of whether V-1 Oil is entitled to such a refund, the record of the proceedings below and the arguments presented to this Court clearly establish that V-1 Oil initiated and has pursued this litigation for the limited purpose of obtaining a refund of the fees it has paid into the Trust Fund. As such, we conclude that V-1 Oil is not entitled to an award of attorney fees under the private attorney general doctrine.

VI.
CONCLUSION

The district court's order granting partial summary judgment in favor of V-1 Oil and denying the Trust Fund's motion for summary judgment is affirmed. The issue of whether V-1 Oil is entitled to a refund is not remanded to the district court, as we hold that V-1 Oil is not entitled to a refund of the transfer fees it has paid. Costs to respondent; no attorney fees are awarded on appeal.

Justices TROUT, SILAK and SCHROEDER, **CONCUR**.

Justice JOHNSON, **CONCURRING IN THE RESULT**.

I concur in the result reached in the Court's opinion. In doing so, I announce that I consider the opinion in this case effectively to overrule *Kootenai County Property Ass'n v. Kootenai County.*, 115 Idaho 676, 769 P.2d 553 (1989).

The Court's opinion attempts to distinguish *Kootenai* by stating that in *Kootenai* "everyone who paid the solid waste disposal fee entitled to the benefit of solid waste disposal

services," while in this case, "[e]ligibility to participate in the insurance program is not related to payment of the transfer fee." Slip. op 5. In my view, this attempted distinction is not valid.

In *Kootenai*, the Court held that because any owner of a habitable residential dwelling was eligible to use the county waste disposal site, the charge imposed on them was a fee and not a tax. 115 Idaho at 678, 769 P.2d at 555. The essence of this logic was that it was up to the owner whether they chose to send their solid waste, if they had any, to the county waste disposal site. In the present case, anyone who pays the transfer fee is eligible to participate in the Trust Fund's insurance program, if they choose to have storage tanks, as V-1 has. In *Kootenai*, only those who chose to use the county waste disposal site received a benefit. Here, only those who choose to have storage tanks benefit. Having disagreed with the Court in *Kootenai*, and having attempted without success to convince the Court that *Kootenai* controlled, I now enthusiastically accept what I consider to be the demise of *Kootenai* as precedent. "It is said that there is nothing so dangerous to the status quo as an idea whose time has come. More dangerous yet is the continuance of an idea whose time has past." *Olsen v. Olsen*, 98 Idaho 10, 21, 557 P.2d 604, 615 (1976) (Shepard J., dissenting).

APPENDIX C — OPINION OF THE SUPREME COURT OF THE STATE OF IDAHO DATED AUGUST 3, 1996

IN THE SUPREME COURT OF THE STATE OF IDAHO

1995 OPINION NO. 93

Docket No. 21222

V-1 OIL COMPANY,

Plaintiff-Respondent,

v.

IDAHO PETROLEUM CLEAN WATER TRUST FUND,

Defendant-Appellant.

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bonneville County. Hon. Ted V. Wood, District Judge.

Appeal from partial summary judgment declaring dedication of petroleum transfer fee to non-highway purposes unconstitutional. *Affirmed.*

Holland & Hart, Boise, for appellant. B. Newal Squyers argued.

Simpson, Gauchay & Gardner, Idaho Falls; Mofatt, Thomas, Barrett, Rock & Fields, Boise, for respondent. Robert E. Bakes, argued.

Appendix C

In response to a congressional mandate directing the upgrading and cleanup of underground petroleum storage tanks, the Idaho Legislature enacted the Clean Water Trust Fund Act. This act provide a trust fund for storage-tank liability insurance (Trust Fund). The Trust Fund is primarily funded through a transfer fee levied on the first licensed petroleum distributor to transfer title to petroleum in this state.

In March 1992, V-1 Oil Company (V-1 Oil) filed a complaint in district court seeking reimbursement for the fees it had paid under the Clean Water Trust Fund Act. V-1 Oil argued that the transfer fee is actually a gasoline tax, and the proceeds of the tax are not dedicated to highway maintenance and construction projects as required by Article VII, Section 17 of the Idaho Constitution.

V-1 Oil moved for and was granted a partial summary judgment. The district court agreed with V-1 Oil that the transfer fee is effectively a tax and the proceeds of that tax must be dedicated to highway construction or maintenance. The district court reserved ruling on the amount of the potential refund. Respondent, Trust Fund, sought and was granted permission to appeal the district court's partial summary judgment in favor of V-1 Oil. The Supreme Court granted petitions by Western Petroleum Marketers' Association and Idaho Highway Users, Incorporated, to appear as *amicus curiae* in this appeal. V-1 Oil seeks attorney fees on appeal under Idaho Code Section 12-117 and the private attorney general doctrine.

The Supreme Court affirmed the district court. The Supreme Court held that a fee assessed for transferring title to petroleum products is not a charge for services provided by the

petroleum trust fund program. Because the fee is not related to the services funded by the revenue raised by that fee, the Supreme Court concluded that the transfer fee is a tax on gasoline and like motor vehicle fuels. Because Article VII, Section 17 of the Idaho Constitution requires that the proceeds of fuel taxes must be dedicated exclusively to highway maintenance, construction, and supervision, the Supreme Court held that the proceeds of the fee cannot be allocated to the trust fund.

The Supreme Court rejected V-1 Oil's argument that V-1 Oil was entitled to attorney fees on appeal. Noting that the Trust Fund is not a "state agency" within the meaning of Idaho Code Section 12-117, the Court held that V-1 Oil could not recover attorney fees under the statute. The Supreme Court also denied V-1 Oil's claim for attorney fees under the private attorney general doctrine, noting that V-1 oil initiated and prosecuted this action in an attempt to recover the transfer fees it has paid.

Appendix C

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 21222

Boise, December 1995 Term

1995 Opinion No. 93

Filed: August 3, 1995

Frederick C. Lyon, Clerk

V-1 OIL COMPANY,

Plaintiff-Respondent,

v.

IDAHO PETROLEUM CLEAN WATER TRUST FUND,

Defendant-Appellant.

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bonneville County. Hon. Ted V. Wood, District Judge.

Appeal from partial summary judgment declaring dedication of petroleum transfer fee to non-highway purposes unconstitutional. *Affirmed.*

Holland & Hart, Boise, for appellant. B. Newal Squyers argued.

Appendix C

Simpson, Gauchay & Gardner, Idaho Falls; Mofatt, Thomas, Barrett, Rock & Fields, Boise, for respondent. Robert E. Bakes, argued.

McDEVITT, Chief Justice

I.
BACKGROUND AND FACTS

This case presents no disputed facts. V-1 Oil Company (V-1 Oil) is a distributor of petroleum products licensed to do business in Idaho. As to at least some of the petroleum products V-1 Oil sells in Idaho, V-1 Oil is the first licensed distributor to transfer the petroleum products within this state.[1] As the first licensed distributor to transfer title to a petroleum product in this state, V-1 Oil is required by the Idaho Petroleum Clean Water Act to pay a one cent per-gallon transfer fee on those petroleum products. The proceeds of that transfer fee are committed to the Idaho Petroleum Clean Water Trust Fund (Trust Fund), which insures the owners and operators of petroleum storage tanks who participate in the program against claims for personal injuries and property damage arising from the accidental release of petroleum from the storage tanks. V-1 Oil does not participate in the Trust Fund.

On March 2, 1992, V-1 Oil filed a complaint in district court against the Trust Fund, seeking an order that the petroleum transfer fee charged under the Idaho Petroleum Clean Water Trust Fund Act, I.C. § 41-4908(7), constitutes a

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1. The record establishes that V-1 Oil is both a primary and secondary distributor of petroleum products in this state. As discussed below, the district court denied V-1 Oil's motion for summary judgment on the issue of to what extent V-1 Oil was impacted by the imposition of the transfer fee.

gasoline tax. Because the Idaho Constitution requires that the proceeds of any tax on gasoline be dedicated exclusively to the construction, repair, maintenance, and traffic supervision of the public highways of this state, V-1 Oil sought to obtain a refund of the "fees" it had paid and to have the fee declared unconstitutional under Article VII, Section 17 of the Idaho Constitution. V-1 Oil filed a motion for summary judgment on both the constitutionality of the transfer fee and V-1 Oil's entitlement to a refund of those fees it has paid. The Trust Fund filed a cross motion for summary judgment on the constitutionality of the transfer fee.

On December 13, 1993, the district court issued a memorandum decision and order granting V-1 Oil's motion in part and denying the Trust Fund's motion. The district court concluded that the petroleum transfer fee is, in effect, a gasoline tax. Because the proceeds of that tax are not dedicated to the construction and maintenance of highways as required by the Idaho Constitution, the district court held that the tax was unconstitutional under Article VII, Section 17 of the Idaho Constitution. The district court also held that the record was not sufficient to determine, as a matter of law, what remedy was available to V-1 Oil. The Trust Fund sought and was granted permission to appeal the partial summary judgment. The Trust Fund argues on appeal that the district court erred in concluding that the transfer fee constitutes a "tax on gasoline and like motor vehicle fuels" under the Idaho Constitution Article VII, Section 17. V-1 Oil seeks attorney fees on appeal.

Appendix C

II.
STANDARD OF REVIEW

When reviewing a district court's ruling on a motion for summary judgment, this Court liberally construes the record in favor of the party opposing the motion, resolving all inferences that reasonably can be drawn from the record in that party's favor. *E.g., Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994); *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994). This standard is not lessened because both parties have moved for summary judgment. *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 606, 888 P.2d 383, 385 (1995); *Kromrei v. AID Ins. Co.*, 110 Idaho 549, 551, 716 P.2d 1321, 1323 (1986). However, this Court has recently observed that "when both parties move for summary judgment on the same issues and legal theories based on the same, essentially uncontroverted facts, the record is unlikely to reveal genuine issue of material fact." *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 200, 899 P.2d 411, 413 (1995). When reviewing a district court's ruling on such motions, this Court must examine each motion separately, alternatively resolving the reasonable inferences presented by the record in opposition to each party's motion. *Id.*

III.
THE TRANSFER FEE IMPOSED UNDER THE IDAHO CLEAN WATER TRUST FUND ACT IS A TAX ON GASOLINE AND LIKE MOTOR VEHICLE FUELS

The Idaho Constitution expressly provides that the proceeds of all gasoline taxes must be dedicated exclusively to the construction, repair, maintenance, and supervision of public

highways. Article VII, Section 17 of the Idaho Constitution provides:

> GASOLINE TAXES AND MOTOR VEHICLE REGISTRATION FEES TO BE EXPENDED ON HIGHWAYS. On and after July 1, 1941 the proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state . . . shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever.

Idaho Const. art. VII, § 17. This Court has held that this provision is unambiguous, and the plain meaning of this section prohibits the transfer of revenues collected from taxes on motor vehicle fuels to any purpose other than construction, repair, maintenance, and supervision of public highways. *Williams v. Swensen*, 93 Idaho 542, 544, 467 P.2d 1, 3 (1970) ("The plain meaning of Art. 7, § 17 of the Constitution is that all moneys collected from the enumerated sources must be used for the designated purpose and may not be diverted therefrom."); *State ex rel. Moon v. Jonasson*, 78 Idaho 205, 209-10, 299 P.2d 755, 757 (1956) ("The constitutional provision prohibiting the transferring of revenues specified therein to any other purpose than those enumerated is all inclusive; it was enacted by the people of the State. It is plain and unambiguous and is not

subject to the construction contended for by appellant."). Based upon our conclusion that there is no interpretation of the fund that would bring the fund within the purposes provided for in Article VII, Section 17 of the Idaho Constitution, the sole issue before this Court is whether the transfer fee is a tax on motor vehicle fuels.

The Trust Fund argues that the transfer fee is a charge imposed on those who participate in the storage tank insurance program. As such, the Trust Fund argues that the transfer fee is a fee charged to provide a service, rather than a tax on gasoline. In support of this proposition, the Trust Fund relies on *Kootenai County Property Ass'n v. Kootenai County,* 115 Idaho 676, 769 P.2d 553 (1989). In *Kootenai,* this Court held that an annual solid waste disposal fee was not a tax because that fee was "reasonably related to the services rendered by the county in acquiring, establishing, maintaining and operating its solid waste disposal system." *Id.* at 680, 769 P.2d at 557.

It is important to note at the outset that the prior cases in which this Court was required to determine whether a fee constituted a tax, involved municipal and county actions. In those cases, the question of whether the fee constituted a tax was relevant to the authority of the entity to assess the fee. In the present case, there is no dispute that the legislature has the authority to levy a tax on motor vehicle fuels, and the significance of whether the petroleum transfer fee constitutes a tax is relevant only to whether the proceeds of that fee must be dedicated to the purposes required under Article VII, Section 17 of the Idaho Constitution.[2]

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2. Although there is no dispute that the legislature is authorized to assess and collect the fee at issue in this appeal, V-1 Oil's standing to challenge the constitutionality of the way in which the proceeds of that fee are spent has not been challenged by the Trust Fund and therefore will not be resolved by this Court on appeal

Appendix C

In order for the transfer fee to be a "fee for service" under *Kootenai*, the fees collected must bear a reasonable relationship to the service provided to those paying the fee. In the present case, however, the transfer fee is not related to participation in or the opportunity to participate in the Trust Fund's insurance program. The fee is charged to the first licensed petroleum distributor to transfer title to petroleum in Idaho "for the privilege of engaging in the delivery or storage of petroleum products[,]" I.C. § 41-4908(7), not for participating in the Trust Fund's insurance program.

This case is not analogous to *Kootenai*, where everyone who paid the solid waste disposal fee was entitled to the benefit of solid waste disposal services. Eligibility to participate in the insurance program is not related to payment of the transfer fee. Distributors who do not store petroleum in storage tanks in Idaho are required to pay the transfer fee although they do not participate in the insurance program, while people and entities who store petroleum in storage tanks but are not licensed petroleum distributors are entitled to participate in the Trust Fund's insurance program without paying the fee.

The per-gallon transfer fee assessed for engaging in the privilege of delivering petroleum products in this state is not, as the Trust Fund argues, a fee charged for the services provided by the Trust Fund's insurance program. The transfer fee is levied for the express purpose of raising revenue for the Trust Fund and, as such, is a tax. *See Brewster v. City of Pocatello*, 115 Idaho 502, 504, 768 P.2d 765, 767 (1988) ("It is quite clear that the ordinance in question in the instant case was enacted for the purpose of raising revenue only . . . . A license that is imposed for revenue is not a police regulation, but a tax, and can only be upheld under the power of taxation.") (quoting *State v. Nelson*, 36 Idaho 713, 722, 213 P.358, 361 (1923)).

The parties do not dispute that the transfer fee is levied, in part, on "gasoline and like motor vehicle fuels" within the meaning of Article VII, Section 17 of the Idaho Constitution. The Idaho Petroleum Clean Water Act defines the terms "petroleum" and "petroleum products" to expressly include "motor gasoline, gasohol, other alcohol blended fuels, diesel fuel, heating oil and aviation fuel." I.C. § 41-4903(23). Moreover, according to the affidavits submitted by V-1 Oil, the only petroleum products relevant to this appeal are diesel fuel and gasoline.

To the extent that the petroleum transfer fee has been assessed against "gasoline and like motor vehicle fuels[,]" the allocation of the proceeds of that fee to fund the Trust Fund violates Article VII, Section 17 of the Idaho Constitution.[3]

IV.
V-1 OIL IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL

V-1 Oil seeks attorney fees on appeal under I.C. § 12-117 and the private attorney general doctrine. I.C. § 12-117 is

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3. This holding does not direct that the Idaho Petroleum Clean Water Trust Fund itself is unconstitutional. Although the mechanism used to finance the trust fund is unconstitutional, the Idaho Petroleum Clean Water Trust Fund Act provides an alternative funding mechanism to be utilized in the event that the transfer fee was held unconstitutional. The Act provides:

> In the event the trust fund is unable to repay the funds drawn from the state general account under the temporary line of credit established under paragraph (b) of this subsection due to the dissolution of the trust fund pursuant to a court order, then an amount necessary to repay the line of credit shall be appropriated by the next regular session of the state legislature.

I.C. § 41-4904(5)(c).

inapplicable. The Trust Fund is not a state agency within the meaning of I.C. § 67-5201, which is incorporated into I.C. § 12-117 by reference. I.C. § 12-117(4)(b). The definition provided by I.C. § 67-5201 provides that an "agency" is "each state board, commission, department or officer authorized by law to make rules or to determine contested cases . . . ." The Trust Fund has no power to promulgate rules or decide contested cases, and is not an agency subject to attorney fees under I.C. § 12-117.

We also reject V-1 Oil's invitation to award attorney fees under the private attorney general doctrine. In *Hellar v. Cenarrusa,* 106 Idaho 571, 682 P.2d 524 (1984), this Court adopted a three-factor test to determine whether attorney fees should be awarded under the private attorney general doctrine. When making such a determination, this Court must consider (1) the strength of the societal importance of the public policy vindicated by the litigation; (2) the need for private enforcement and the magnitude of the resultant burden on the plaintiff; and (3) the number of people standing to benefit from the decision sought. *Id.* at 577-78, 682 P.2d at 530-31; *see also Miller v. Echohawk,* 126 Idaho 47, 49, 878 P.2d 746, 748 (1994) (applying *Hellar* test to review award of fees under private attorney general doctrine).

V-1 Oil filed a complaint in district court seeking a refund of all funds paid by V-1 Oil pursuant to the Idaho Petroleum Trust Fund Act. Regardless of whether V-1 Oil is entitled to such a refund, the record of the proceedings below and the arguments presented to this Court clearly establish that V-1 Oil initiated and has pursued this litigation for the limited purpose of obtaining a refund of the fees it has paid into the Trust Fund. As such, we conclude that V-1 Oil is not entitled to an award of

attorney fees under the private attorney general doctrine.

V.
CONCLUSION

The district court's order granting partial summary judgment in favor of V-1 Oil and denying the Trust Fund's motion for summary judgment is affirmed. Costs to respondent; no attorney fees are awarded on appeal.

Justices SILAK and SCHROEDER, CONCUR.

Justice JOHNSON, joined by Justice TROUT, dissenting.

I respectfully dissent from the Court's opinion. So far as the record before this Court discloses, characterizing the transfer fee as a tax is in conflict with *Kootenai County Property Ass'n v. Kootenai County*, 115 Idaho 676, 769 P.2d 553 (1989).

The Court's opinion attempts to distinguish *Kootenai* by stating that in *Kootenai* "everyone who paid the solid waste disposal fee entitled to the benefit of solid waste disposal services," while in this case, "[e]ligibility to participate in the insurance program is not related to payment of the transfer fee." Slip. op 5. In my view, this attempted distinction is not borne out by the evidence presented to the trial court by V-1 Oil.

In *Kootenai*, the Court held that because any owner of a habitable residential dwelling was eligible to use the county waste disposal site, the charge imposed on them was a fee and not a tax. 115 Idaho at 678, 769 P.2d at 555. In the present case, V-1 Oil did not show that there is any licensed distributor who pays the transfer fee who is not eligible to participate in the Trust Fund's insurance program.

Appendix C

For the purposes of summary judgment, V-1 Oil had the initial burden of establishing that at least one of those licensed distributors who pays the transfer fee is not eligible to participate in the Trust Fund's insurance program; only then would the Trust Fund have the burden of producing evidence to the contrary. *Magic Lantern Productions, Inc. v. Dolsot*, __ Idaho __, 892 P.2d 480, 482 (1995).

So far as the record in this case indicates, there is no licensed distributor who pays the transfer fee who is not eligible to participate in the Trust Fund's insurance program. The record discloses that V-1 Oil has twenty-four underground storage tanks and two above ground storage tanks. In fact, V-1 Oil applied for participation in the Trust Fund's insurance program but chose not to proceed with its application when the Trust Fund requested permission to conduct an assessment on V-1 Oil's property.

The only other evidence in the record concerning the eligibility to participate in the Trust Fund's insurance program by those licensed distributors who pay the transfer fee is contained in an affidavit of the principal shareholder and operator of B-D Oil Company. B-D Oil sells to V-1 Oil a significant portion of the petroleum product B-D Oil purchases for resale. The affidavit discloses that B-D Oil "does not own or operate *any underground storage tanks* in the State of Idaho." (Emphasis added). The absence of underground storage tanks does not, however, eliminate B-D Oil from participation in the Trust Fund's insurance program. The program is also available for owners or operators of above ground storage tanks, farm tanks, residential tanks, and heating tanks. I.C. § 41-4908(2), (3), and (4). It was V-1 Oil's burden to show the lack of eligibility of at least one licensed distributor who pays the

transfer fee. V-1 Oil failed to carry this burden, and the trial court should not have granted summary judgment.

In its opinion, the Court also focuses on the fact that "entities who store petroleum in underground storage tanks but are not licensed petroleum distributors are entitled to participate in the Trust Fund's insurance program without paying the fee." Slip. op. 5-6. This fact does not distinguish this case from *Kootenai.* In *Kootenai,* owners of commercial property upon payment of a charge for actual usage were eligible to use the county waste disposal site. 115 Idaho at 679, 769 P.2d 556.

I would vacate the summary judgment and remand the case for further proceedings.

APPENDIX D — ORDER GRANTING SUMMARY JUDGMENT OF THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO FILED JANUARY 12, 1994

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

Case No. CV-92-01129

V-1 OIL COMPANY,

Plaintiff,

vs.

IDAHO PETROLEUM CLEAN WATER TRUST FUND,

Defendant.

ORDER

This matter came before the Court on cross motions for summary judgment. The plaintiff appeared through counsel of record, Kent W. Gauchay of the law firm of SIMPSON, GAUCHAY & GARDNER, and the defendant appeared

through B. Newal Squyres and Murray Feldman from the Boise office of the law firm of HOLLAND & HART. Briefs and affidavits were submitted by both parties and oral argument was held on October 7, 1993. On December 13, 1993, the Court filed its Memorandum Decision Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment.

Based on the Court's findings and conclusions as set forth in its Memorandum Decision of December 13, 1993, and good cause appearing;

IT IS HEREBY ORDERED;

1. That the $.01 per gallon transfer fee on petroleum products charged under Idaho Code § 41-4908(7) is not a fee that is charged for a direct public service, but is a tax forcibly charged upon the public at large to meet public needs.

2. That to the extent that said $.01 per gallon transfer fee is applied to gasoline and like motor fuel sold or used to propel vehicles upon the highways of the State of Idaho, and said fees are used to fund the IPCWTF, said fees are being used unconstitutionally. To the extent that the transfer fee is being used unconstitutionally, it is being charged unconstitutionally.

3. That a genuine issue of material fact exists as to the amount of the transfer fee collected on gasoline and other like motor fuels in violation of Article VII, Section 17 of the Idaho Constitution; determination of that issue is reserved until the time of trial.

4. That a material fact exists as to what amount of the $.01

per gallon transfer fee paid by V-1 plaintiff V-1 is entitled to receive as a refund, which issue is reserved for trial.

5. That defendant's Motion for Summary Judgment is denied.

6. That matters relating to attorneys fees and costs associated with the cross motions for summary judgment will be preserved until trial.

DATED this 11 day of January, 1994.

s/ TED V. WOOD
Ted. V. Wood
District Judge

Appendix D

NOTICE OF ENTRY

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing to the persons listed below, prepaying the postage thereon this 08 day of January, 1994.

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RONALD L. LONGMORE
Clerk of the Court

s/ illegible
Deputy Clerk

APPENDIX E — MEMORANDUM DECISION GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO FILED DECEMBER 13, 1993

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CASE NO. CV-92-01129

V-1 OIL COMPANY,

Plaintiff,

v.

IDAHO PETROLEUM CLEAN WATER TRUST FUND,

Defendant.

MEMORANDUM DECISION GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I.

INTRODUCTION

The State of Idaho enacted the Idaho Petroleum Clean Water Trust Fund Act of 1990 [hereafter "Act"], which Act imposes a one cent per gallon "transfer fee" upon distributors of petroleum products and is used to fund a trust for underground storage tank insurance [hereafter "IPCWTF"]. On March 12,

1992 plaintiff V-1 Oil Co. [hereafter "V-1"] filed a complaint against defendant Idaho Petroleum Clean Water Trust Fund [hereafter "IPCW"], alleging that (1) said transfer fee is actually a tax on gasoline and motor fuels and its intended use therefore violates Idaho Const. art 7, § 17, (2) that all funds collected pursuant to the Act should be refunded, and (3) the Act violates the constitutional right to freedom of contract and anti-trust laws. On September 17, 1993, the freedom of contract and anti-trust claims were dismissed.

On January 29, 1993, V-1 filed a motion for summary judgment in which V-1 requested the court to rule as a matter of law that the transfer fee imposed pursuant to the Act is unconstitutional. On June 1, 1993, IPCW filed a cross-motion for summary judgment on the constitutionality of the Act and a motion for summary judgment on V-1's right to a refund.

On October 7, 1993, argument on the motions was heard by the Honorable Ted V. Wood. At the conclusion thereof, the court took the matter under advisement.

II.

STANDARD FOR GRANTING SUMMARY JUDGMENT

The law is well established in Idaho that on a motion for summary judgment, the court must determine whether the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Rule 56(c) I.R.C.P.; *Boise Car and Truck Rental Company v. Waco Inc.*, 108 Idaho 780, 702 P.2d 818 (1985). The party opposing the motion is to be given the benefit

of all favorable facts and inferences which might be reasonably drawn from the evidence. *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986).

The standards for summary judgment require the district court to liberally construe the facts in favor of the non-moving party and to draw all reasonable inferences from the record in favor of the non-moving party. *Doe v. Durtschi; Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982). Further, all doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions. *Asby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979); *Doe v. Durtschi; Lundy v. Hazen*, 90 Idaho 323, 411 P.2d 768 (1966). "There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party, and summary judgment should be granted if the evidence in opposition to the motion is merely colorable or is not significantly probative." *G&M Farms v. Funk Irrigation Co. et al.*, 119 Idaho 514, 517, 808 P.2d 851 (1991).

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III.

DISCUSSION

A. IS THE COLLECTION OF A PETROLEUM PRODUCTS TRANSFER FEE WHICH IS USED TO FUND AN INSURANCE TRUST A VIOLATION OF THE IDAHO CONSTITUTION?

1. *Is the transfer fee a disguised tax?*

V-1 argues that because (1) the transfer fee is a forced contribution used to meet general public needs, and (2) V-1 derives no benefit in the form of services from payment of the transfer fee, the transfer fee is a disguised tax. IPCW argues that because the transfer fee (1) is specifically authorized by statute, (2) is used in a manner consistent with that statute, (3) is reasonably related to the services provided, and (4) is not a general revenue raising measure, the transfer fee is properly labeled as such, and is therefore not a tax.

The legal distinction between a fee and a tax has been analyzed by the Idaho Supreme Court in four recent cases, each of which will be discussed in turn. In each of the four cases a similar issue was presented, *i.e.*, the form of charges that a public entity may exact from its citizens for services rendered, *e.g.*, in the form of a tax, fee, or regulation. In each case it was argued that the public entity mislabeled the charge in question and that therefore, given its real nature, the public entity exceeded its authority in exacting such charges.

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a. *Brewster v. City of Pocatello.*

In *Brewster v. City of Pocatello,* 115 Idaho 502, 768 P.2d 765 (1988), the City of Pocatello needed revenue for maintenance of its streets. The imposition of a tax for this purpose would have been statutorily authorized, but such a tax lacked necessary local voter approval. The city therefore imposed a "street restoration and maintenance fee" upon owners and occupants of property that abutted the city's streets. In defense, the city claimed that the fee was specifically authorized under I.C. § 63-2201A, which authorizes taxing districts to impose fees in lieu of ad valorem taxes.

The Idaho Supreme Court noted, however, that I.C. § 63-2201A does not allow taxing districts to impose other forms of taxation in lieu of ad valorem taxes.*Brewster,* 115 Idaho at 504. Thus it was necessary for the court to determine whether the charge was, in fact, a tax or a fee. In making such a determination, the court analyzed the concept of fees exacted in connection with regulatory enactments:

> Admittedly, municipalities under art. 12, § 2 are empowered to enact regulations for the furtherance of the public health, safety or morals or welfare of its residents. *See Caeser v. State,* 101 Idaho 158, 610 P.2d 517 (1980); *Rowe v. City of Pocatello,* 70 Idaho 343, 218 P.2d 695 (1950). Such police power regulation may provide for the collection of revenue incidental may provide for the collection of revenue incidental to the enforcement of that regulation. *State v. Nelson,* 36 Idaho 713, 213 P. 358 (1923);

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Foster's, Inc. v. Boise City, 63 Idaho 201, 118 P.2d 721 (1941). Our decision in *Greater Boise Auditorium District v. Royal Inn of Boise*, 106 Idaho 884, 684 P.2d 286 (1984) overruled *State v. Nelson, supra*, only in party, which is not relevant herein. If municipal regulations are to be held validly enacted under the police power, funds generated thereby must bear some reasonable relationship to the cost of enforcing the regulation. *State v. Nelson, supra; Foster's, Inc. v. Boise City, supra.*

As stated in *State v. Nelson, supra*, municipal regulations enacted under the police power may provide revenue incidental to the enforcement of the regulation.

> It is quite clear that the ordinance in question in the instant case was enacted for the purpose of raising revenue only, — first, because by its terms it so provides, and secondly, it has no provisions of regulation. (citation omitted). A license that is imposed for revenue is not a police regulation, but a tax, and can only be upheld under the power of taxation. (citation omitted). 36 Idaho at 722, 213 Pac. at 361.

This Court in *Forster's, Inc. v. Boise*

City, supra, relied upon the principles of *Nelson* when it upheld the validity of a Boise city parking meter ordinance. It determined that any revenue collected through the operation of the parking meters was incidental to the city's police power to regulate traffic and parking. The Court noted in *Foster's* that while the right to travel over a street or highway is a primary absolute right of everyone, it may be regulated in many ways such as speed, stops, rights of way, and required vehicle equipment. The Court stated:

> Effective exercise of the police power necessarily involves expenditures in many ways. The means and instrumentalities, by and through which the supervising powers of the policing authority are brought to bear on the subject to be regulated, involve costs and expenses. It is only reasonable and fair to require the business, traffic, act, or thing that necessitates policing to pay this expense. To do so has been uniformly upheld by the courts. *On the other hand, this power may not be resorted to as a shield or subterfuge, under which to enact and enforce a revenue-raising ordinance or statute.* (emphasis added). 63 Idaho at 218-219, 118 P.2d at 728. *Brewster,* 115 Idaho at 504. (original emphasis).

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The court also analyzed the concept of fees imposed in connection with the non-regulatory, or proprietary functions of government:

> We agree with appellants that municipalities at times provide sewer, water and electrical services to its residents. However, those services, in one way or another, are based on user's consumption of the particular commodity, as are fees imposed for public services such as the recording of wills or filing legal actions.
>
> [ ] Even assuming that the city possessed authority to declare all of its streets subject to the payment of a toll, such would not justify the imposition of a fee upon an owner or occupier of property adjacent to such a toll facility solely because of such occupancy or ownership. In any event, such scheme would certainly require authorizing legislation. *Brewster,* 115 Idaho at 505.

The court compared the fee at issue with a tax and concluded that, for all practical purposes, the fee was the same as a tax:

> We view the essence of the charge at issue here as imposed on occupants or owners of property for the privilege of having a public street abut their property. In that respect it is not dissimilar from a tax imposed for the privilege of owning property within the

> municipal limits of Pocatello. The privilege of having the usage of city streets which abuts one's property, is in no respect different from the privilege shared by the general public in the usage of public streets. *Brewster*, 115 Idaho at 504.

The court then defined the general difference between a tax and a fee as follows:

> In a general sense a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs. *Brewster*, 115 Idaho at 505.

Because the fee in that case was neither imposed in connection with a regulation or in connection with a non-regulatory service, the court held that the imposition of the fee was in reality the imposition of a tax. Without local voter approval, such tax was invalid. *Brewster*, 115 Idaho at 505.

b. *Kootenai County Property Ass'n v. Kootenai County, and Loomis v. City of Hailey.*

In *Kootenai County Property Ass'n v. Kootenai County*, 115 Idaho 676, 769 P.2d 553 (1989), county landowners brought suit which challenged the county's imposition of an annual solid waste disposal fee. The landowners argued, among other things, that the fee was, in reality, a tax. The court found the landowners' distinctions between (1) present and future benefits, (2) specific and general benefits, and (3) voluntary and involuntary payments, as they applied to the distinction

between a fee and a tax, to be unpersuasive. *Kootenai,* 115 Idaho at 679. Specifically, the court found that not only did the landowners actually receive both present and future benefits, but that the county commissioners had a statutory duty to provide for future needs. *Kootenai,* 115 Idaho at 679. Furthermore, the court stated:

> [T]he legislature, under its police powers, may mandate that citizens must accept certain services, and then require a fee for the receipt of those services. *See, e.g., Schmidt v. Village of Kimberly,* [74 Idaho 48, 256 P.2d 515 (1953)] (ordinance requiring mandatory sewer hookup and requiring payment of reasonable fee, approved); *City of Glendale v. Trondsen,* [48 Cal. 2d 93 308 P.2d 1 (1957)] (ordinance establishing rubbish collection service and requiring payment for service regardless of whether building occupants use the service, approved); I.C. § 42-3201 *et seq.* (legislation authorizing water and sewer district to annex real property into its service area and authorizing tax levies on that property); *Mayer v. Ames,* 133 Ohio St. 458, 14 N.E. 2d 617 (1938), *cert. denied,* 305 U.S. 621, 59 S. Ct. 82, 83 L. Ed. 396 (1938) (ordinance requiring vehicle inspection and payment of inspection fee, approved); Cal. Health & Safety Code § 44000 *et seq.* (West 1982) (legislation requiring vehicle inspection and payment of fee for the inspection and necessary service); *see also*

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> McQuillan, *Municipal Corp.* § 24.250, § 31.30a (state has police power to require water, sewage, solid waste disposal service and fee); 7A Am. Jur. 2d AUTOMOBILES AND HIGHWAY TRAFFIC § 202 (1980) (state has police power to require vehicle inspection and payment of inspection fee). *Kootenai*, 115 Idaho at 679.

In each of the cases cited, the fee for the service in question was based upon a resident's consumption of said service, *see, Brewster,* 115 Idaho at 505, and its imposition was therefore rooted firmly in the state's regulatory power, *see Schmidt,* 74 Idaho at 63. Once the fee for the particular service is approved, the only requirement is that it be reasonably related to the benefit conveyed. *Kootenai*, 115 Idaho at 680.

Distinguishing the facts of that case from those in *Brewster,* the *Kootenai* court stated:

> The basis upon which the ordinance in *Brewster* was overturned — that it lacked specific legislative authorization — is not present here. As pointed out above, under I.C. § 31-4404(1) and (2) Kootenai County was authorized to enact either a solid waste disposal tax or a solid waste disposal fee. Kootenai County chose the fee system. *Kootenai*, 115 Idaho at 680.

In *Loomis v. City of Hailey,* 119 Idaho 434, 807 P.2d 1272 (1991), city residents challenged the city of Hailey's method of determining water and sewer service connection fees. The court

noted that Idaho Const. art 8, § 3 allows municipalities to impose rates and charges for public works projects, and pursuant to this section of the Idaho Constitution, the Idaho Legislature enacted the Idaho Revenue Bond Act.[1]

> It is pursuant to this Act and a municipality's proprietary function that the City of Hailey derives its authority to charge water and sewer connection fees.
>
> The Idaho Revenue Bond Act grants municipalities the right to operate public works "for the use and benefit of those served by such works and for the promotion of the welfare and for the improvement of health, safety, comfort and convenience" of its residents. I.C. § 50-1028.
>
> [ ] in *Schmidt v. Village of Kimberly*, this Court upheld the validity and constitutionality of the Idaho Revenue Bond Act and stated: The charges made for water and sewer service are not taxes. (Citations omitted.)
>
> [ ] Thus, when the rates, fees and charges conform to the statutory scheme set forth in the Idaho Revenue Bond Act or are imposed pursuant to a valid police power, the charges are not construed as taxes. *Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515

1. Codified at I.C. §§ 50-1027 through 50-1042.

> (1953). However, if the rates, fees and charges are imposed primarily for revenue raising purposes they are in essence disguished taxes and subject to legislative approval and authority. *Loomis,* 119 Idaho at 438.
>
> [ ] The Idaho Revenue Bond Act authorizes the collection of sewer connection fees, *Schmidt v. Village of Kimberly,* 74 Idaho 48, 256 P.2d 515 (1953), and it is clear that so long as the fees collected pursuant to the Idaho Revenue Bond Act are allocated and budgeted in conformity with that Act they will not be construed as taxes. However, if fees are collected under the disguise of the Act and allocated and spent otherwise, then the fees are primarily revenue raising and will be construed as taxes. *Loomis,* 119 at 439.

Idaho Code §§ 31-4404(1) and (2) and 50-1028 are themselves based upon valid exercises of the state's police power and proprietary functions, *ergo,* local ordinances enacted pursuant to those statutes are also valid exercises of the state's police power and proprietary functions. In this regard, statutory authority alone is not conclusive as to the right of the municipality to charge a fee for a service, but operates as a sort of "safe harbor" for ordinances enacted to serve either regulatory or proprietary purposes. If the statute itself constitutionally provides for the exacting of certain fees, then local ordinances enacted pursuant to and in conformity with that statute may be constitutional as well.

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c. *Alpert v. Boise Water Corp.*

Contrary to the IPCW's contention that *Brewster* is not instructive and has been limited to its facts by *Loomis* and *Kootenai*, the Idaho Supreme Court in *Alpert v. Boise Water Corp.*, 118 Idaho 136, 795 P.2d 298 (1990) stated:

> Appellants Alpert and Flying H cite *Brewster v. Pocatello*, 115 Idaho 502, 768 P.2d 765 (1988), in support of their assertion that the franchise fee in this action is a tax. The tax imposed in *Brewster* is certainly distinguishable from the franchise fee being charged by the utilities and cities in this action. Although a different statute was involved in *Brewster, the case is instructive to analyze the distinction between a fee and a tax. Alpert*, 118 Idaho at 145. (emphasis added).

The Alpert court noted that "[i]t is well established that Idaho cities have the right to own and operate utilities and provide those services to their residents. *Alpert*, 118 Idaho at 144. In applying *Brewster's* tax-versus-fee analysis to the facts of *Alpert*, the court held:

> In the instant case the legislature has given to the cities the authority to either provide the utility services directly or allow a franchisee to provide those services to its residents. Likewise, the cases, statutes and the Idaho Constitution cited herein clearly allow the charging of a reasonable fee for

granting a franchise to a utility. In addition, the franchise agreements in this case provide that the municipalities or cities will not compete with the utilities in providing these services. The three percent franchise fee is not imposed on the residents directly by the cities, but is paid by the utilities to the cities and as a cost of business is then passed on to the consumers by the utilities. Although the users of the utility services eventually pay the three percent fee it is not a tax on the general public. *Brewster v. Pocatello,* 115 Idaho 502, 768 P.2d 765 (1988). The water and gas services provided by the utilities in this case are based on consumption and use by the resident. *As noted in Brewster, the providing of sewer, water, electrical and other utility services to residents based on consumption of the commodity is a charge for a direct public service as compared to a tax which is a forced contribution by the public-at-large for revenue raising purposes.* As such the tax imposed in *Brewster* is clearly distinguishable from the fee charged on the accounts of the consumers of the utility service presented in this case. We hold that the three percent fee charged to the customers of the various gas and water utilities is a valid franchise fee and not a prohibited tax. *Alpert,* 118 Idaho at 145. (emphasis added)

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d. *Is the petroleum transfer fee a tax or a fee?*

The issues in the aforementioned cases concern the right of public entities to charge a fee or a tax for certain services, as distinguished from the present case where the issue turns not on the right of the state to charge a fee or tax, but rather, the manner in which the state spends the fee or tax revenue. The common thread among the cited cases and the case at hand is limited to the distinction between taxes and fees which is best stated in *Brewster.*

In the present case the transfer fee is not being charged for a regulatory purpose[2]. Therefore, the decision as to whether the transfer fee is, in realty, a fee or a tax requires an analysis of (1) whether the transfer fee is levied upon a direct public service rendered to the particular consumer and is reasonably related to the cost of that service, or (2) whether the transfer fee is a forced contribution by the public at large to generate revenue to meet public needs.

IPCW characterizes the availability of the insurance funded by IPCWTF as a service, just like the services provided in *Kootenai* and *Loomis*, apparently in an effort to use those two cases as authority for its position that a direct benefit from that service is being conveyed to V-1. IPCW's Memorandum in

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2. *E.g.*, the Act does not mandate or compel any parties to comply with any type of regulations or provide for any enforcement of any regulations. *See Kootenai*, 115 Idaho at 679. Although IPCW argued orally that the Act is part of a federal-state regulatory scheme to clean up leaking underground storage tanks, there is no evidence that the federal regulations actually require any state involvement at all. To the contrary, proof of financial responsibility required by the federal regulations may be satisfied through self-insurance 40 CFR 280, sub-part H.

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Support of Its Motion for Summary Judgment, p. 2, 18, 23, 26, 27, 28. However, in each and every one of the cases cited herein, the direct public service provided was either (1) a utilities or consumptive type service, *e.g.*, water, gas, electric, or sewage, or (2) a direct or contractual type of service, *e.g.*, filing fees, registration fees, franchise fees, for which the fees were paid as consideration for said contract or service. The service provided in this case, *i.e.*, the availability at insurance, is neither consumed nor necessarily provided in consideration for any fees that V-1 may be paying.

Additionally, there is no evidence of any benefit in fact being conferred to V-1 as a result of its payment of the transfer fee. IPCW argues that if no benefit is conferred upon V-1, it is a result of V-1 voluntarily not complying with the eligibility requirements[3] and failing to pursue the application procedures.

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3. I.C. § 41-4911 Storage tanks eligible for insurance.

(1) Eligible storage tanks are those tanks that meet all of the following criteria:

(a) Appropriate fees required in section 41-4908, Idaho Code, or section 41-4910A, Idaho Code, have been paid;

(b) The tank, if an underground storage tank, is in compliance with applicable federal and state underground storage tank regulations;

(c) The tank is used only for storage of petroleum products;

(d) The tank, if an underground storage tank, passes a tank tightness test;

(Cont'd)

IPCW then likens those requirements and procedures to regulations concerning the size of a garbage can, the type of garbage in the can, and the day of the week that a city or county resident may set the garbage can out for collection, *i.e.*, the requirements found in *Kootenai.* IPCW's Memorandum in Support of Its Motion for Summary Judgment, p. 27. The court is not convinced by IPCW's analogy that the two are similar at all. Therefore, because no direct public service or benefit is conferred to V-1 by the availability of insurance funded through IPCWTF, any fee charged to V-1 for services that it does not receive, as a matter of law, must be considered unreasonable.

On the other hand, a state may assess taxes without regard

(Cont'd)

(e) The tank, if an above ground storage tank, is in compliance with state and federal regulations including the uniform fire code. If an above ground tank is exempt from state or federal regulations and/or the uniform fire code by virtue of its being installed prior to the effective date of such regulations or the uniform fire code, such tank is not eligible unless it passes a tank tightness test;

(f) The, tank, if a farm tank or residential tank, is in compliance with any applicable state or federal regulations;

(g) Any contamination has been cleaned up, or a plan for cleanup or removal approved by the Idaho department of health and welfare, division of environmental quality, is being implemented; provided, however, that the trust fund shall not pay for any costs associated with prior contamination.

(2) Any tank which is a part of a refiner's terminal or a tank directly supplied by a pipeline shall not be eligible.

for whether a direct public service to the taxpayer is conferred. This is the nature of forced contributions by the public at large which are assessed for revenue raising purposes. In the present case, payment of the transfer fee is forced upon V-1, a member of the public at large, without regard as to whether insurance funded by the IPCWTF will be issued to it.

Furthermore, the transfer fee is imposed:

> [U]pon the first licensed distributor who transfers title to a petroleum product to another legal entity within this state*for the privilege of engaging in the delivery or storage of petroleum products* whose delivery or storage may present the danger of discharge into the environment and thus create the liability to be funded. I.C. § 41-4908(7).

Idaho Code, title 63, chapter 24 provides for an excise tax on all gasoline and like motor fuels received by the first licensed distributor in the state. I.C. §§ 63-2403 and 2405. An excise tax is defined as "a tax imposed upon the performance of an act, the engaging of an occupation, or the enjoyment of a privilege." BLACK'S LAW DICTIONARY 506 (1979).

The essence of the transfer fee at issue here is one imposed upon distributors of certain petroleum products for the privilege of distributing those products in Idaho. In that respect it is not dissimilar from the excise tax imposed for the privilege of distributing those same petroleum products in Idaho. *See Brewster,* 115 Idaho at 504. Because (1) the availability of the insurance provided by the Act is not the type of service for

which there is case authority that justifies the charging of a fee, nor is any direct public service or benefit being conferred upon V-1, and (2) the transfer fee is a forced contribution from V-1 for revenue raising purposes, *e.g.*, to fund the IPCWTF, the court must find as a matter of law that the transfer fee is, in reality, a tax.

2. *Are the revenues produced from the transfer fee being used in violation of Idaho Const. art 7, § 17?*

V-1 argues that because (1) the transfer fee is a tax and is being used by the State of Idaho to fund an insurance trust, and (2) the funding of such trust is not one of the enumerated and limited uses for taxes on gasoline and like motor vehicle fuels permitted by Idaho Const. art 7, § 17[4], use of the revenue from the transfer fee to fund the IPCWTF is unconstitutional. IPCW argues that even if the transfer fee is a tax, (1) it is not a tax "*on* gasoline and like motor vehicle fuels" but, instead, it is a tax on the *transfer* of such products, and 2) it would be a tax on all petroleum products, not just gasoline and like motor fuels, and

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4. Idaho Const, art. 7, § 17 **Gasoline taxes and motor vehicle registration fees to be expended on highways.**

On and after July 1, 1941 the proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state and from any tax or fee for the registration of motor vehicles, in excess of the necessary costs of collection and administration and any refund or credits authorized by law, shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever.

therefore the use of the revenue so derived from the transfer fee is not constitutionally restricted.

IPCW's argument is that because the transfer fee, even if deemed a tax, is only imposed upon the *delivery* or *storage* of petroleum products, and is not imposed "*on* gasoline" itself, there is no constitutional limitation upon the use of revenue derived from said tax. The problem with IPCS's tortured reading of the Idaho constitution is that the fuels excise tax is not levied "on gasoline and like motor vehicle fuels" either but on the *receipt* of such fuels[5]. Likewise, there is a *use tax* on motor fuels not otherwise taxed by the fuels excise tax[6]. IPCW's analysis would, the court presumes[7], only place constitutional limits on the use of revenue derived from ad valorem taxes on fuels, thus allowing the state to use revenue derived under I.C. §§ 63-2402 and 63-2405 in any manner it chooses and without restraint. This argument is, of course, without merit and completely untenable. Therefore, if the constitutional restrictions placed upon the use of revenue derived from "any tax *on* gasoline and like motor vehicle fuels" include taxes on the *receipt* or *use* of gasoline and like motor fuels, they must also include the use of taxes levied upon the *transfer* and *storage* of gasoline and like motor fuels.

IPCW also argues that because the Idaho constitution only limits the use of revenue derived from "any tax on *gasoline and*

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5. I.C. § 63-2405.

6. I.C. § 63-2402.

7. IPCW does not offer an example of what a tax *on* gasoline might be which would be restrained by constitutional limitations and that would not include some "taxable event."

like motor vehicle fuels" and because a tax on *all petroleum products,* as provided for by I.C. § 41-4908, is something altogether different, revenue so derived under I.C. § 41-4908 is not constitutionally restricted. This view is apparently shared by the Idaho Attorney General[8].

While the phrases used in I.C. § 41-4908 and Idaho Const., art. 7, § 17 are different, they are not distinctly different. Gasoline and like motor vehicle fuels as referred to in the constitution are but a subset of petroleum products to which the transfer fee applies. Statutes must be construed, wherever possible, to achieve a constitutional result, and their constitutionality must be upheld wherever reasonable and practical. *Bingham Memorial Hosp. v. Idaho Dept. of Health and Welfare,* 112 Idaho 1094, 1096, 739 P.2d 393 (1987). Therefore, to the extent that the Act imposes a transfer fee upon those petroleum products for which the use of tax revenue derived from them is limited by the Idaho Constitution, *i.e.*, gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of Idaho, such revenue derived from that portion of the transfer fee is being unconstitutionally used to fund the IPCWTF. Since there is no evidence submitted as to the percentage of revenue received from the transfer fees in each of the two classes of petroleum products, *i.e.*, those that are restricted by Idaho Const. art. 7, § 17 and those that are not, there exists a genuine issue of material fact as to what percentage of the transfer fees are actually being used unconstitutionally to fund the IPCWTF.

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8. Attorney General Opinion 90-2.

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B. IS THERE A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER V-1 HAS A RIGHT TO A REFUND?

IPCW argues that because V-1 is a secondary marketer of petroleum products and pays the transfer fee only indirectly as a pass-through charge from its distributor, no legal incidence of taxation falls on it under the Act. Accordingly, IPCW argues V-1 may not receive a refund of any fees it has paid to date.

Whether revenue from a tax is being used by a state for an unconstitutional purpose is a much different question than whether the tax itself is unconstitutionally being charged. In *Automobile Club v. State of Oregon*, 840 P.2d 674 (Or. 1992), the Oregon Supreme Court held that an underground storage tank assessment was in reality a tax on motor fuels and that the intended use of the revenue from that tax violated the Oregon State Constitution's specific and exclusive limits on the uses of such taxes imposed on motor fuels. *Automobile Club*, 840 P.2d 678-681. As a result, the tax, which funded the intended, but unconstitutional use, was held to be unconstitutional as well. *Automobile Club*, 840 P.2d at 681. Accordingly, in the present case, the court finds that to the extent that revenue from the transfer fee is being used unconstitutionally to fund the IPCWTF, the transfer fee is being charged unconstitutionally as well.

In order to receive a refund of taxes that are illegally imposed, the claimant (1) must be a party upon whom the legal incidence of taxation fell, and (2) must have paid the illegal taxes "under protest". *V-1 Oil Co. v. State Tax Comm'n*, 98 Idaho 140, 559 P.2d 756 (1977). In the present case, V-1 submits the affidavit of Bob Clayton who testifies that V-1 has

paid the $.01 per gallon transfer fee charged under the Act directly, although most of the time the fee has only been passed through to V-1 from its supplier. Clayton Affidavit, ¶ 9. IPCW has not presented any evidence as to whether V-1 paid the transfer fee to the tax commissioner, or whether such transfer fees were paid under protest. Therefore, there exists genuine issues of material fact as to (1) what extent the legal incidence of taxation has fallen upon V-1, (2) the amount of any transfer fees paid directly to the state tax commissioner by V-1, and (3) whether any of the payments were paid "under protest".

IV.

CONCLUSION

For the reasons stated herein, the court concludes as follows:

1. The $.01 per gallon transfer fee on petroleum products charged under I.C. § 41-4908(7) is not a fee that is charged for a direct public service, but is a tax forcibly charged upon the public at large to meet public needs.

2. To the extent that said transfer fees are derived from the transfer of title to gasoline and like motor fuels sold or used to propel motor vehicles upon the highways of Idaho, and said fees are being used to fund the IPCWTF, said fees are being used unconstitutionally. To the extent that the transfer fee is being used unconstitutionally, it is being charged unconstitutionally as well. There exists a genuine issue of material fact as to the percentage of said fees so affected.

3. There exists a genuine issue of material fact as to

whether V-1 is entitled to a refund of any transfer fees it has paid to date.

Therefore, V-1's motion for partial summary judgment is hereby granted in part. IPCW's motion for summary judgment is hereby denied. Counsel for V-1 is hereby directed to prepare and submit to the court a proposed order consistent with this memorandum decision.

DATED this 13th day of December, 1993.

s/ Ted V. Wood
TED V. WOOD
DISTRICT JUDGE

Appendix E

CERTIFICATE OF MAILING

I hereby certify that on the 13 day of Dec. 1993, I served a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be hand delivered.

Persons Served:	*Method of Service:*
B. Newel Squires, Esq. HOLLAND & HART PO BOX 2527 Boise, Idaho 83701	(✓) mail ( ) hand
Kent Gauchay, Esq. SIMPSON, GAUCHAY & GARDNER PO Box 50484 Idaho Falls, Idaho 83405-0484	(x) mail ( ) hand
	( ) mail ( ) hand

RONALD LONGMORE
CLERK OF THE DISTRICT COURT

by: s/ D. Simmons
Deputy Clerk

APPENDIX F — LETTER FROM IDAHO STATE TAX COMMISSION DATED MAY 6, 1996

IDAHO STATE TAX COMMISSION

800 Park Blvd., Plaza IV
P.O. Box 36
Boise, Idaho 83722

May 6, 1996

Robert E. Bakes
MOFFATT, THOMAS, BARRETT,
ROCK & FIELDS
P. O. Box 829
Boise, ID 83701

RE: Collections of Petroleum Transfer Fee

Dear Bob:

You asked for some information from the State Tax Commission about the amount of the Petroleum Transfer "Fee" collected by the Commission. The attached page shows the total collections by state fiscal year (July 1 through June 30). The amounts shown for FY '96 are collections received through May 1, 1996 and include amounts on returns for periods ending March 31, 1996. The amounts received after the first Supreme Court decision in the *V-1 Oil* case ($6,978,798), have been held separately.

You also asked about the provision of Idaho Code § 41-4908 (10). That section provides for ceasing of collection of the fee when the "unencumbered balance of the trust fund" exceeds thirty million dollars. The section requires the "director" to notify the commission if that event occurs. Idaho Code § 41-

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4903 defines "director" as the director of the state insurance fund. In my opinion, this section is ministerial to the State Tax Commission. That is, the Commission simply responds to the notice it receives. Its role is non-discretionary. The Commission has not received a notice contemplated in Section 41-4908.

I hope this is responsive to your inquiry.

Respectfully,
s/_____
THEODORE V. SPANGLER, JR.
DEPUTY ATTORNEY GENERAL
(208) 334-7530

TVS: te
Enclosure
0506.1

cc: B. Newal Squyres, Holland & Hart

Appendix F

MONIES COLLECTED TO DATE
TRANSFER FEE

(THRU 5/1/96)

PERIOD	AMOUNT
FY '90	$ 466,200
FY '91	$8,080,500
FY '92	$8,150,700
FY '93	$8,285,800
FY '94	$8,671,700
FY '95	$9,084,700
FY '96 (YTD)*	$7,860,500**
TOTAL	$50,600,100

* From July 1, 1995 thru May 1, 1996.

** Of this amount, $6,978,798 has been placed in a separate account (since 8/3/95). With interest to 5/1/96 included, this value becomes $7,090,099.

APPENDIX G — MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING IN THE SUPREME COURT OF THE STATE OF IDAHO DATED MAY 17, 1996

Robert E. Bakes
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
Post Office Box 829
Boise, Idaho 83701
Telephone: (208) 345-2000

Kent W. Gauchay
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Idaho Falls, ID 83405-0484

16-854.0000

Attorneys for Plaintiff/Respondent

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court No. 21222

V-1 OIL COMPANY, an Idahocorporation,

Plaintiff/Respondent,

vs.

IDAHO PETROLEUM CLEAN WATER TRUST FUND,

Defendant/Appellant.

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IDAHO PETROLEUM CLEAN WATER TRUST FUND,

Defendant/Appellant.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

COMES NOW, Plaintiff/Respondent V-1 OIL COMPANY and, pursuant to Idaho Appellate Rule 42, submits the following Memorandum in Support of the Petition for Rehearing filed by V-1 Oil Company on May 3, 1996.

I.

The Court's April 16, 1996 Opinion on Rehearing, reincorporates substantially all of its earlier August 3, 1995 Opinion, except that it inserts a new paragraph IV entitled, **V-1 -OIL IS NOT ENTITLED TO A REFUND**. However, V-1 Oil's entitlement to a refund was never an issue in this appeal. The trial court never ruled on that issue, recognizing that there were contested issues of fact and difficult legal issues involved in the refund question. The only issue decided by the District Court's partial summary judgment was its holding that the petroleum transfer fee was, in effect, an excise tax on motor fuels which violated Article VII, Section 17 of the Idaho Constitution. The Court certified that issue for appeal under I.R.C.P. 54(b).

The sole issue raised in appellant's brief on appeal was:

> Whether the District Court erred in failing to construe Section 41-4908(7) as imposing a constitutionally permissible charge

> reasonably related to the pollution liability insurance services made available by the trust fund to licensed petroleum distributors and their customers?
>
> Opening Brief of Appellant, p. 8.

That was the only issue which was briefed and argued by the parties. There was never any discussion or analysis of V-1 Oil's entitlement to a refund. Both of this Court's opinions have stated that "The sole issue before this court is whether the transfer fee is a tax on motor vehicle fuels." Opinion, p. 4.

This Court has consistently held that it will not consider or resolve issues which have not been raised by the appellant as an issue on appeal and upon which the parties have not submitted authorities and argument. In *Sun Valley Shopping Ctr. v. Idaho Power,* 119 Idaho 87, 93, 803 P.2d 993 (1991), this Court held that issues not decided below or presented for the first time on appeal will not be considered or reviewed. The Court stated that

> We also have consistently followed the rule that we will not review the actions of a trial court, unless the action has been listed as an issue on appeal, especially where no authorities are cited and no argument is contained in the appellate briefs. 119 Idaho at 93.

I.A.R. 35(a)(4) (1987); *State v. Hoisington,* 104 Idaho 153, 159, 657 P.2d 17, 23 (1983). The issue of V-1 Oil's entitlement to a refund should not have been decided by the Court.

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The Court's *sua sponte* consideration of the refund issue in Part IV also made pronouncements on other legal issues which are seemingly in direct conflict with several statutes and the Constitution. Statements such as "the transfer fee was not unconstitutional" because "the legislature had the authority to levy a tax on motor vehicle fuels", slip opinion at p. 6, overlooks several pertinent statutory and constitutional provisions which raise very significant legal questions about the Court's statements in Part IV. The Court's April 16, 1996 Opinion cites no authority for those statements. There are several express provisions of the Idaho statutes and the Constitution which are contrary to those statements, which are described hereafter.

The Court should grant a rehearing of its April 16, 1996 Opinion on Rehearing, or alternatively reinstate the original Opinion issued on August 3, 1995. As the Court of Appeals observed in *State v. Langdon*, 117 Idaho 115, 118, 785 P.2d 679 (Ct. of App. 1990), "Where, as here, the order has been entered *sua sponte*, without prior notice and opportunity to be heard or to respond by memorandum, concerning the reason for a contemplated dismissal, we think justice requires an opportunity to seek the court's reconsideration."

II.

The Court's Opinion on Rehearing unanimously reaffirms its prior decision that the "transfer fee" imposed upon licensed distributors was not reasonably related to any services provided by the trust fund to those who pay the transfer fee, and thus the transfer fee was in effect an excise tax on motor fuels. As the Court's Opinion and the record demonstrate, a limited group of licensed distributors pay the license fee, even though they may have no need for the insurance services, and hundreds, perhaps

thousands of tank owners receive insurance for which they pay no fee. The Court correctly concluded that the transfer fee paid by the limited group of licensed distributors "is not reasonably related to the benefits provided [to them] by the Trust Fund. The transfer fee is thus a tax." Slip opinion, p. 6.

That holding was sufficient to resolve the sole issue that was raised on appeal. However, Part IV of the Court's Opinion on Rehearing then goes on to address the refund question stating that "it is uncontested that the legislature had the authority to levy a tax on motor vehicle fuels", and, therefore, while "the appropriation of the transfer fees to the trust fund was unconstitutional", the imposition of the transfer fee was not unconstitutional, and, therefore, V-1 Oil was not entitled to a refund. Slip opinion, p. 6.

The question, however, is not whether the legislature had the authority to levy a tax on motor fuels. The question is whether the legislature intended, when it adopted the Clean Water Trust Fund Act, that if the transfer fee which the legislature enacted to support the Trust Fund insurance program was held to be unconstitutional, an eventuality which the legislature expressly contemplated might occur,[1] did the legislature intend that the license fee nevertheless be sustained

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1. The legislative history described in the opening briefs demonstrates that the legislature understood that the "transfer fee" might be held to be unconstitutional, which would result in the Trust Fund being dissolved. I.C. 41-4904(5)(c) states "In the event the trust fund is unable to repay the funds drawn from the state general account under the temporary line of credit established under paragraph (b) of this subsection *due to the dissolution of the trust fund pursuant to a court order*, then an amount necessary to repay the line of credit shall be appropriated by the next regular session of the state legislature. Refer to Legislative Committee Minutes. (emphasis added).

as a motor vehicle fuels tax. Can the Tax Commission continue to collect the one cent per gallon transfer fee for the benefit of the Highway Trust Fund? What is to happen to the funds already collected? Those questions raise significant legal issues which the Court ought not to have discussed without the issues having been raised, briefed and argued by the parties.

While the Court's Opinion does not directly state that the Tax Commission can continue to collect the one cent per gallon "transfer fee" as an excise tax on motor fuels, the Court's April 16, 1996 Opinion is being construed to mean that the one cent per gallon "transfer fee" is still collectible as an excise tax on motor fuels because of the language in Part IV of the Court's Opinion that "it is uncontested that the legislature had the authority to levy a tax on motor fuels." Slip opinion, p. 6. The effect has been to raise the motor fuels tax by one cent per gallon. That result is contrary to the following statutes and constitutional provisions which demonstrate that the legislature did not intend that result.

Title 63, Chapter 24 imposes the taxes on the several types of motor fuels. During the time period reflected in the trial record, I.C. Section 63-2405 provided that "An excise tax is hereby imposed on all gasoline and/or aircraft engine fuel received. The tax is to be paid by the licensed distributor, and measured by the total number of gallons of gasoline and/or aircraft engine fuel received by him, at the rate of 21¢ per gallon." Other sections in Chapter 24 provided for similar excise taxes on special fuels.

Of critical significance is I.C. Section 63-2431, which provides:

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> The taxes imposed by this chapter shall be in lieu of all other *excise taxes, license -fees* or property taxes imposed upon gasoline, aircraft engine fuel or special fuels by this state or any political subdivision of this state. [emphasis supplied]

Section 63-2431 is clear and unambiguous. The legislature did not want any other excise taxes or license fees on motor fuels which would increase the tax to over 21¢ per gallon. "This court must give full effect to the clearly stated intent of the legislature." *TTX v. Idaho State Tax Commission*, __ Idaho __, __ P.2d __ (April 22, 1966).

> When a statute is unambiguous, it must be interpreted in accordance with its language, *Moon v. Investment Board*, 97 Idaho 595, 548 P.2d 861 (1976), courts must follow it as enacted, *Newlan v. State*, 96 Idaho 711, 535 P.2d 1348 (1975), and a reviewing court may not apply rules of construction, Roe *v. Hopper*, 90 Idaho 22, 408 P.2d 161 (1965).

State v. Wiedmeier, 121 Idaho 198, 191, 824 P.2d 120, 122 (1992).

It is further clear, from examining the Clean Water Trust Fund Act as a whole, that the legislature did not intend that the transfer fee imposed in I.C. Section 41-4908(7) be anything other than a source of funding for the underground storage tank insurance program. In I.C. Section 41-4914 the legislature declared that "All monies which may come into the Idaho Petroleum Clean Water Trust Fund are hereby perpetually

appropriated to, the manager of the State Insurance Fund as Trustee to be expended by him for the purposes of this chapter." There is no intimation that in the event the transfer fee imposed upon license distributors was held to violate Article VII, Section 17 of the Idaho Constitution, that the legislature would have intended the one cent transfer fee to be upheld as an additional one cent tax on the motor fuels tax. Nor do the statutes contemplate that the court would direct that "The revenue raised from the imposition of the transfer fees must be appropriated for uses consistent with Article VII, Section 17 of the Idaho Constitution." Slip opinion, p. 6-7. I.C. 63-2431 expressly states that there are to be no other excise taxes or license fees on motor fuels. The legislative history, including the Attorney General's opinion, points out that the legislature chose the name of "transfer fee", and attempted to structure the one cent levy as a fee for a service, to avoid the application of Article VII, Section 17, and to distinguish it from the other excise taxes and license fees, which I.C. Section 63-2431 states are exclusively provided for in Title 63, Chapter 24. Having failed in their attempt to establish a valid fee for a service, there is no indication that the legislature intended the one cent transfer fee to become an additional excise fee or license fee on motor fuels outside of Chapter 24 of Title 63, thereby impliedly repealing I.C. Section 63-2431.

The effect of the language in Part IV of the Court's Opinion, as interpreted by the Tax Commission, is to judicially raise the motor fuels tax from 21¢ to 22¢ per gallon (after April 1, 1996, from 25¢ to 26¢ per gallon). Reading Sections 63-2405, 63-2431, and 41-4914, in parimaterial it is clear that the legislature did not intend the transfer fee to become a motor fuels tax in the event it could not constitutionally be collected in the Trust Fund insurance program. The legislature expressly stated in I.C. 63-2431 that the 21¢ excise tax imposed in Section

632405 was "in lieu of all other excise taxes, license fees or property taxes imposed upon gasoline. . . [and other products] by the state . . ."

This expression of legislative intent is further supported by I.C. Section 67-3511(2) which states, in part, "Legislative appropriations shall not be transferred from one fund to another unless *expressly* approved by the legislature." Additionally, Article VII, Section 13 of the Idaho Constitution provides that "No money shall be drawn from the treasury, but in pursuance of appropriations made by law." The legislature *perpetually* appropriated the one cent transfer fee to the Clean Water Trust Fund. The Court can void the transfer fee because it is unconstitutional. But the fee cannot be transmuted into an excise tax on motor fuels in violation of I.C. 63-2431, and 67-3511(2).

On at least two occasions this Court has reversed District Court judgments which had the effect of transferring funds from one program to another in violation of the statute and the Constitution. In *George v. Donovan*, 114 Idaho 388, 391, 757 P.2d 651 (1988) this Courtstated:

> We have also held that "no money may lawfully be paid from the treasury except pursuant to and in accordance with an act of the Legislature, expressly appropriating it to the specific purpose for which it is paid." *Epperson v. Howell*, 28 Idaho 338, 343-44, 154 P. 621, 623 (1918). *Accord State v. Ex rel. Willliams, supra.*

* * *

Appendix G

> The order of the district court below directing the Department to transfer funds appropriated to non-mandatory programs to the CDDP was error. It directed the Department to do that which our Constitution forbids. Mandamus will not lie in such circumstances. 114 Idaho at 391.

In *Williams v. State Legislature of Idaho*, 111 Idaho 156, 722 P.2d 465 (1986), this Court vacated a permanent injunction issued by the trial court which had the effect of transferring funds and personnel from one department to another.

In *Idaho County Property Owners Assn. v. Syringa Gen. Hosp. Dist.*, 119 Idaho 309, 805 P.2d 1233 (1991), this Court held that an injunction should issue to prevent a hospital district from accumulating several years funds from a levy which I.C. Sec. 39-1333 stated were raised "annually to supply funds." The Court held that the taxes must be used for the purpose set out in the statute, and not for a different purpose. The "transfer fee" cannot be used for any other purpose according to the Court's decision in the *Idaho County Property Owners Assn.* case. *See also Darrell O. Lind v. Rockland School Dist. No. 382*, 120 Idaho 928, 821 P.2d 983 (1991) ("We now turn our attention to the expenditure of the funds. Once funds are approved, a school district is limited to the amount authorized by the election and is further limited to expending those funds in a manner consistent with the statute pursuant to which the election was held.")

Even if the legislature had not stated that the 21¢ per gallon motor fuels tax was "in lieu of all other excise taxes and license fees" on motor fuels, the one cent transfer fee imposed upon

licensed distributors in I.C. Section 41-4908(7) is so integrally intertwined with the entire Clean Water Trust Fund Act that, under the standard recently established by this Court in *Boundary Backpackers v. Boundary County*, __Idaho __, 913 P.2d 1141 (1996), the license fee cannot reasonably be severed from the Act. The Court's opinion in *Boundary Backpackers* stated that if an unconstitutional portion of a statute or ordinance is an integral or indispensable part of the Act, the unconstitutional portion is not severable, and the entire measure must fall, even if there is a severability clause. The Court in the *Boundary Backpackers* case held that the Boundary County land use ordinance was entirely invalid because the federal land could not be affected by the ordinance because of federal preemption. The Court held that the federal land was "integral and indispensable to the ordinance." The Court stated:

> It is clear to us that the board did not intend to attempt to regulate only state land, but instead intended to regulate the use of all public land in the county. To sever the portions that attempt to restrict federal agencies and leave those that attempt to restrict state agencies emasculates the obvious purpose of the ordinance. Slip opinion at p. 10-11.

The transfer fee is integrally intertwined in the Trust Fund in several ways.

I.C. Section 41-4908(10) provides that

> The director [of the Clean Water Trust Fund]

> shall certify to the [Tax] commission when the unencumbered balance in the trust fund equals thirty million dollars ($30,000,000). Effective the first day of the second month following the date of such certification, the imposition of the transfer fee shall be suspended. Thereafter, the director shall certify to the commission when the unencumbered balance in the trust fund equals twenty million dollars ($20,000,000). Effective the first day of the second month following the date of such certification, the imposition of the transfer fee shall be reinitiated.

I.C. 41-4908(10) gives the director of the Clean Water Trust Fund, an executive branch officer, the authority to suspend or reimpose the "transfer fee", which the Court has now held to be an unconstitutional excise tax. The Director's control is an integral part of the Clean Water Trust Fund Act which cannot be ignored.

Furthermore, the Trust Fund Act, by its own terms, requires that collections of the license fee cease when the unencumbered balance exceeds $30,000,000. If this Court had a factually developed record it would demonstrate that the State Tax Commission has collected over $50,000,000 since the inception of the transfer fee. See the letter dated May 6, 1996, of Deputy Attorney General Theodore V. Spangler, Jr., Appendix A attached hereto. Since the license fee cannot constitutionally be collected to fund the trust fund insurance program, the effect of the Court's Opinion is to unencumber all of the $50,000,000 collected to date. The Act would then

require the collections to cease, which is inconsistent with treating the transfer fee as a motor fuels tax.

Finally, the legislature perpetually appropriated the transfer fee to the Trust Fund insurance program. The Court cannot change that purpose. *Idaho County Property Owners Assn. V Syringa Gen. Hosp., supra.* It can only void the "transfer fee" because it violates Article VII, Section 17 of the Constitution.

In this case, it is clear that the legislature, in enacting the Clean Water Trust Fund Act did not intend to raise the motor fuels tax from 21¢ to 22¢, but intended solely to fund an insurance program for underground storage tanks, which it accomplished unfortunately by an unconstitutional tax. The one cent fee, which was appropriated perpetually to the Trust Fund, is such an integral and indispensable part of the funding of the insurance program in the Clean Water Trust Fund Act, and the imposition or suspension of the fee is so controlled by the director of the fund, that the Court should apply its recent decision in the *Boundary Backpackers* case, and hold that the unconstitutionally imposed license fee is too integral and indispensable to the Clean Water Trust Fund Act Program to survive for some other purpose, such as an additional one cent tax on motor fuels. The legislature has expressly stated in I.C. Section 63-2431 that there are to be no other excise taxes or license fees on motor fuels. The Court should not transfer the fee to another purpose in violation of I.C. Sec. 67-3511(2), but should void the transfer fee and hold that it could not constitutionally be collected, as the original opinion held.

The 1996 legislature enacted House Bill 825, amending I.C. Section 63-2405, increasing the excise tax on motor fuels to

25¢ per gallon. I.C. Section 63-2431 remains in full force and effect and provides that the 25¢ tax imposed in the amended I.C. Section 63-2405 shall be in lieu of all other excise taxes or license fees on motor fuels. The 1996 amendment to I.C. 63-2405 is the most recent expression of the legislature. It is presumed that the legislature was aware of the Court's original August 3, 1995 opinion that the one cent transfer fee was unconstitutional. *George W. Watkins Family v. Messenger,* 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990) ("It is assumed that when the legislature enacts or amends a statute it has full knowledge of the existing judicial decisions and case law of the state.") House Bill 825 did not add the one cent transfer fee to the excise tax on motor fuels. The Bill unequivocally states that the excise tax on motor fuels is "at the rate of twenty-five cents (25¢) per gallon."

The statements in Part IV of the Opinion on Rehearing suggesting that the unconstitutional "transfer fee" can survive as a valid excise tax on motor fuels, are in direct violation of I.C. 63-2431, and the clear intent expressed in the Clean Water Trust Fund Act. In effect, Part IV of the Court's Opinion has imposed an additional one cent excise tax on motor fuels, retroactive to 1990. That result is contrary to the statutes and strongly implicates the separation of powers provision in Article II, Section 1 of the Idaho Constitution.

Finally, even if the "transfer fee" could be transformed into a motor fuels tax, the persons who are obligated to pay the "transfer fee" under the Clean Water Trust Fund Act, may not be the same persons who would be obligated to pay the excise tax under the Motor Fuels Act. That is reason enough for not opening up the refund issue *sua sponte.*

The foregoing are just some of the serious legal and factual problems which Part IV of the Court's Opinion on Rehearing has produced. Since the issue of whether V-I Oil Company was entitled to a refund was never raised as an issue or briefed by any party, the Court should grant a rehearing and reinstate its original Opinion issued August 3, 1995, so that an adequate factual and legal record can be developed in the District Court.

III.

There is express statutory authority for V-1 Oil to claim a refund. The Court's *sua sponte* determination in Part IV that V-1 Oil is not entitled to a refund, seemingly overlooks I.C. Section 63-2410(4) which provides:

> Any licensed distributor *paying the gasoline tax* and/or aircraft engine fuel tax to the state of Idaho *erroneously* shall be allowed a credit or refund of the amount of tax paid by him *if a written claim for refund is filed with the commission* within three (3) years after the date those taxes were paid.

The Court makes no reference to or analysis of that statute in Part IV of its Opinion on Rehearing. The Court should grant a rehearing so that the parties can brief and argue this and other statutes which relate to refunds.

In addition, the United States Supreme Court has held that "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S.

18, 31, 110 Sup. Ct. at 2247 (1990). In *Harper v. Virginia Department of Taxation*, 509 U.S. 86, __, 113 Sup. Ct. 2510, 2519 (1993), the Supreme Court stated "In providing such relief, a state may either award full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a nondiscriminatory scheme.' "

Both the Idaho statutes, and the due process clauses of the U.S. Constitution and Article I, Section 13 of the Idaho Constitution, provide V-1 Oil with a right to claim a refund of the unconstitutional license fees which it paid under protest. Either a rehearing should be granted on the refund issue or, more appropriately, the Court should reinstate the original Opinion and remand that issue to the District Court in order to develop a factual and legal record.

IV.

ATTORNEYS FEES

The Court's Opinion on Rehearing, as it now stands, grants the relief requested in Count I of V-1 Oil Company's complaint which alleged that the transfer fee "is unconstitutional as violative of Article VII, Section 17 of the Idaho Constitution." The Opinion on Rehearing then denies the claim in Count II of V-1 Oil's complaint requesting a refund, even though that issue was not raised.

V-1 Oil's complaint clearly contained two separate claims. Neither the complaint below nor the arguments presented on appeal were initiated or pursued for the limited purpose of obtaining a refund. V-1 Oil has, at great expense, provided private attorney general services to the State of Idaho

establishing that the transfer fee imposed in the Clean Water Trust Fund Act is unconstitutional. This brief on rehearing further attempts to demonstrate that the Court's Opinion on Rehearing, which turns the "transfer fee" into an excise tax on motor fuels, violates I.C. Section 63-2431, 67-3511(2), 63-2405. The totally integrated nature of the Clean Water Trust Fund Act, I.C. Section 41-4901, et seq., would preclude the severing and resurrecting of the unconstitutional transfer fee even if I.C. Section 63-2431 and 67-3511(2) did not exist. V-1 Oil requests the Court to reconsider its claim for fees for the private attorney general services which it has rendered.

V.

CONCLUSION

V-1 Oil requests the Court to either eliminate Part IV of its Opinion on Rehearing, or to grant a rehearing for the following reasons:

1. Part IV of the Court's Opinion raises *sua sponte* an issue that was never raised by the parties and was not briefed or argued. The parties have been denied the right to be heard on that issue.

2. Part IV of the Court's Opinion is based upon an analysis which is contrary to several sections of the Idaho statutes and the Idaho and United States Constitutions. The Court has made pronouncements which seemingly have turned the transfer fee imposed by I.C. Section 41-4908(7) into an excise tax on motor fuels, in effect raising the tax on motor fuels from 21¢ to 22¢, in direct contravention to I.C. Section 63-2431, 67-3511(2), 63-2405, and Article VII, Section 13 of the Idaho Constitution.

Appendix G

3. There is express statutory and constitutional authority for V-1 Oil to claim a refund for motor fuels taxes erroneously paid.

4. V-1 Oil requests attorney fees in pursuing this appeal and rehearing claim.

WHEREFORE, Respondent requests that the Court rehear its April 16, 1996 Opinion and remove Part IV of that Opinion. The Court's original August 3, 1995 Opinion correctly resolved the only issue that was before the Court.

DATED this 17th day of May, 1996.

MOFFATT, THOMAS, BARRETT,
ROCK & FIELDS, CHARTERED

s/ Robert E. Bakes
Robert E. Bakes - of the Firm
Attorneys for Respondent

APPENDIX H — PAGE 8 OF BRIEF

ISSUE PRESENTED FOR REVIEW

Whether the district court erred in failing to construe Section 41-4908(7) as imposing a constitutionally permissible charge reasonably related to the pollution liability insurance services made available by the Trust Fund to licensed petroleum distributors and their customers?

ARGUMENT

The district court held that Section 41-4908(7) imposed a tax on gasoline with the proceeds used for nonhighway purposes in violation of Article 7, Section 17.[6] It concluded that the transfer charge was not a fee reasonably related to the insurance services provided by the Trust Fund. The court's analysis completely overlooked fundamental principles of constitutional and statutory interpretation; misread this Court's decisions determining that statutorily imposed charges are fees for services and not taxes; misperceived the purpose and effect of the Act creating the Trust Fund; and ignored the Tax Commission's contemporaneous administrative interpretation that Section 41-4908(7) imposes a fee and not a tax.

The creation of the Trust Fund reflects a permissible legislative choice to provide petroleum storage tank insurance services not otherwise available to Idaho tank owners . . .

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6. This provisions provides in part that "any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state . . . shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways." Idaho Const. art. 7, § 17.

APPENDIX I — RELEVANT STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Idaho Code § 63-2405

63-2405. Imposition of tax.— (1) An excise tax is hereby imposed on all gasoline and/or aircraft engine fuel received. The tax is to be paid by the licensed distributor, and measured by the total number of gallons of gasoline and/or aircraft engine fuel received by him, at the rate of twenty-five cents (25¢) per gallon. That tax, together with any penalty and/or interest due, shall be remitted with the monthly distributor's report required in section 63-2406, Idaho Code.

(2) The excise tax rate set forth in this section shall, when applied to gasohol or to special fuels designed for use in diesel engines, be reduced by the same percentage that the quantity of denatured anhydrous ethanol contained in the gasoline or, in the case of special fuels the quantity of such special fuel which is derived from agricultural products or the wastes of such products, bears to the total fuel subject to tax. Provided however, in no event shall the rate set forth in this section be reduced more than ten percent (10%). [I.C., § 63-2405, as added by 1983, ch. 158, § 4, p. 436; am. 1983 (Ex. Sess.), ch. 1, § 5, p. 3; am. 1984, ch. 87, § 2, p. 169; am. 1984, ch. 195, § 34, p. 445; am. 1986, ch. 344, § 2, p. 851; am. 1988, ch. 198, § 1, p. 376; am. 1991, ch. 120, § 1, p. 259; am. 1994, ch. 166, § 1, p. 373; am. 1996, ch. 343, § 4, p. 1149.]

Idaho Code § 63-2410

63-2410. Refund of gasoline tax procedure. —(1) Any person who shall purchase fifty (50) gallons or more, and use the gasoline in motor vehicles operated on highways outside of the state of Idaho where a duplicate tax is assessed for the same

gasoline, shall be entitled to refund when a claim is presented to the commission in the manner required in subsection (5)(c) of this section. Claimant shall present to the commission a statement accompanied by a verification of the use determined by an audit of his operations conducted as prescribed by the tax commission; or his claim may be verified by the filing of a receipt or proof showing the payment of tax on the gasoline used in any other state.

(2) Any person who shall purchase within any one (1) calendar year fifty (50) gallons or more of gasoline used for the purposes described in this subsection shall be entitled to be refunded the amount of gasoline tax previously paid on that gasoline. Exempt uses are:

(a) Operating stationary gasoline engines;

(b) Propelling equipment or vehicles, other than motor vehicles, which are not operated on a highway; and

(c) Operating commercial motor boats.

(3) No refund of gasoline tax shall be allowed for any gasoline which is:

(a) Used in motor vehicles required to be licensed or used in any motor vehicle exempt from registration by reason of the ownership or residence;

or

(b) Aircraft engine fuel placed in aircraft, provided however, if tax has been paid at the rate provided in section

63-2405, Idaho Code, on any motor fuel placed in the fuel supply tank of an aircraft the user of the fuel may apply for a refund of the difference between the tax paid on the fuel and the tax imposed in section 63-2408, Idaho Code; or

(c) Gasoline used in recreational vehicles; or

(d) Gasoline used in noncommercial motor boats or in boats operated by a governmental entity.

(4) Any licensed distributor paying the gasoline tax and/or aircraft engine fuel tax to the state of Idaho erroneously shall be allowed a credit or refund of the amount of tax paid by him if a written claim for refund is filed with the commission within three (3) years after the date those taxes were paid. Such credit or refund shall include interest at the rate established in section 63-3045, Idaho Code, computed from the date taxes to be refunded or credited were paid to the commission.

(5)(a) All claims for refund of gasoline taxes arising under subsection (1), (2) or (3)(b) of this section shall be filed in conjunction with the claimant's income tax return due pursuant to chapter 30, title 63, Idaho Code. The gasoline tax refund claimed shall be tax paid on gasoline actually purchased during the taxable year to which the income tax return relates. The gasoline tax refund due shall be offset against any other taxes, penalties or interest due before any balance is refunded by the commission to the claimant. Subject to a limitation as to the amount of refund to be claimed as the commission may provide by rule, refund claims may be submitted and paid on a monthly basis and reconciled on the income tax return when it is filed.

(b) If a claimant is not required to file an income tax return, the refund claim shall be made on forms and in the manner as the commission may provide. The claim shall relate to taxes paid on gasoline actually purchased in the calendar year preceding the filing and the claim shall be filed on or before April 15 following the close of the calendar year.

(c) Claims for refunds under subsection (1) or (2) of this section shall be filed within the time and in the manner prescribed in section 63-3072, Idaho Code.

(d) The commission may require that all claims be accompanied by the original signed invoice or invoices issued to the claimant, showing the total amount of gasoline on which a refund is claimed and the reason, the amount of the tax and any additional information required by the commission. Each separate delivery shall constitute a purchase and a separate invoice shall be prepared, at least in duplicate, to cover the delivery. All invoices, except those prepared by a computer or similar machine, shall be prepared in ink or double-spaced carbon shall be used between the original and first duplicate.

(6)(a) Should the commission find that the claim contains errors, it may correct the claim and approve it as corrected, or the commission may require the claimant to file an amended claim. The commission may require any person who makes a claim for refund to furnish a statement under oath, giving his occupation, description of the machine or equipment in which the gasoline was used, the place where used and any other information as the commission may require. If the commission determines that any claim has been fraudulently presented, or is supported by an invoice

or invoices fraudulently made or altered, or that any statement in the claim or affidavit is willfully false and made for the purpose of misleading, the commission may reject the claim in full. If the claim is rejected, the commission may suspend the claimant's right to any refund for purchases made during a period not to exceed one (1) year beginning with the date the rejected claim was filed, and it shall take all other action deemed appropriate.

(b) The commission has authority, in order to establish the validity of any claim, to examine the books and records of the claimant for that purpose, and failure of the claimant to accede to the demand for the examination may constitute a waiver of all rights to the refund claimed.

(7) In the event of the loss or destruction of the original invoice or invoices, the person claiming a refund may submit a duplicate copy of the invoice certified by the vendor, but payment based on the duplicate invoice shall not be made until one (1) year after the date on which the gasoline was purchased. [I.C., § 63-2410, as added by 1983, ch. 158, § 4, p. 436; am. 1986, ch. 175, § 1, p. 84; am. 1993, ch. 47, § 4, p. 119; am. 1995, ch. 132, § 5, p. 565; am. 1995, ch. 348, § 2, p. 1142.]

Idaho Code § 63-2431

63-2431. Tax in lieu of all other taxes imposed.— The taxes imposed by this chapter shall be in lieu of all other excise taxes, license fees or property taxes imposed upon gasoline, aircraft engine fuel or special fuels by this state or any political subdivision of this state. [I.C., § 63-2431, as added by 1983, ch. 158, § 4, p. 436.]

Appendix I

Idaho Code § 41-4908

41-4908. Source of trust fund — Application fees — Application for enrollment — Transfer fees. — (1) Every owner or operator of an underground storage tank may, if he desires to apply to the trust fund to insure the underground tank, make application for and pay into the trust fund an initial application fee set by the administrator, but not to exceed twenty-five dollars ($25.00) for each tank for which application for coverage is made.

(2) Every owner or operator of an above ground storage tank may, if he desires to apply to the trust fund to insure the above ground tank, make application for and pay into the trust fund an initial application fee set by the administrator, but not to exceed twenty-five dollars ($25.00) for each tank for which application for coverage is made.

(3) Every owner or operator of a farm tank or residential tank may, if he desires to apply to the trust fund to insure the tank, make application for and pay into the trust fund an initial application fee set by the administrator, but not to exceed twenty-five dollars ($25.00) for each tank for which application for coverage is made.

(4) Every owner or operator of a heating tank may, if he desires to apply to the trust fund to insure the tank, make application for and pay into the trust fund an initial application fee set by the administrator, but not to exceed five dollars ($5.00) for each tank for which application for coverage is made.

(5) The application for insurance shall be made to the

administrator on forms furnished and prescribed by him for the purpose of eliciting reasonably available information as to the type and use of the storage tank, the type of business enterprise of the tank owner or operator, the age of the storage tank, the materials used in the construction of the tank and the inside and outside protective coatings and other corrosion protective measures, leak detection methods, spill and overfill prevention methods of the tank, the location of the tank and its proximity to roads and buildings, the foundation and type of material used as a bedding and fill for the tank, any available inspection records of the tank including the gallons of petroleum products entered into the tank and the gallon dispersements from the tank, and other information that is reasonably prudent in order to obtain a sufficient body of statistical data to determine the relative hazards of various categories of tanks, the potential that future leaks or discharges may occur, and the conditions under which cleanup costs and personal injury and property damage costs may occur and vary in the severity of the release and the resultant costs to the trust fund.

(6) The administrator shall act upon the application for insurance with all reasonable promptness, and he shall make such investigations of the applicant as he deems advisable to determine if the information contained in the application for insurance is accurate and complete. The administrator shall determine if the applicant's storage tanks meet all the eligibility requirements and promptly notify the applicant of the acceptance or nonacceptance of the application for insurance. The absence of unknown data requested on the application shall not preclude an applicant's acceptance for coverage by the trust fund, if the applicant is otherwise eligible for insurance under this chapter.

(7) In addition to the application fees received by the trust fund pursuant to this section, the trust fund shall receive the revenue produced by the imposition of a "transfer fee" of one cent ($.01) per gallon on the delivery or storage of all petroleum products as defined in subsection (23) of section 41-4903, Idaho Code, delivered or stored within the state of Idaho. This transfer fee is hereby imposed upon the first licensed distributor who transfers title to a petroleum product to another legal entity within this state for the privilege of engaging in the delivery or storage of petroleum products whose delivery or storage may present the danger of a discharge into the environment and thus create the liability to be funded. The fee imposed by this subsection shall not apply to (a) petroleum or petroleum products which are first delivered or stored in this state in a container of fifty-five (55) gallons or less if such container is intended to be transferred to the ultimate consumer of the petroleum or petroleum products or (b) petroleum or petroleum products delivered or stored in this state for the purpose of packaging or repackaging into containers of fifty-five (55) gallons or less if such container is intended to be transferred to the ultimate consumer of the petroleum or petroleum products.

(8) The transfer fee shall be collected by the commission on all petroleum products delivered or stored within this state after April 1, 1990. This transfer fee shall be in addition to any excise tax imposed on gasoline and/or aircraft engine fuel or other petroleum products and shall be remitted to the commission with the distributor's monthly report as required in section 63-2406, Idaho Code. The distributor may deduct from his monthly report those gallons of petroleum products returned to a licensed distributor's refinery or pipeline terminal storage or exported from the state when supported by proper documents approved by the commission. For the purpose of carrying out

its duties under the provisions of this chapter, the commission shall have the powers and duties provided in sections 63-3038, 63-3039, 63-3042 through 63-3066, 63-3068, 63-3071, and 63-3074 through 63-3078, Idaho Code, which sections are incorporated by reference herein as though set out verbatim.

(9) No person shall be excused from liability for any duty or fee imposedin this chapter for failure to obtain a distributor's license.

(10) The director shall certify to the commission when the unencumbered balance in the trust fund equals thirty million dollars ($30,000,000). Effective the first day of the second month following the date of such certification, the imposition of the transfer fee shall he suspended. Thereafter, the director shall certify to the commission when the unencumbered balance in the trust fund equals twenty million dollars ($20,000,000). Effective the first day of the second month following the date of such certification, the imposition of the transfer fee shall be reinitiated. [I.C., § 41-4908, as added by 1990, ch. 119, § 1, p. 266; am. 1991, ch. 59, § 5, p. 113.]

Idaho Code § 41-4914

41-4914. Perpetual appropriation.— All moneys which may come into the Idaho petroleum clean water trust fund are hereby perpetually appropriated to the manager of the state insurance fund as trustee to be expended by him for the purposes of this chapter. [I.C., § 41-4914, as added by 1990, ch. 119, § 1, p. 266.]

Appendix I

Idaho Code § 67-3511

67-3511. Transfer of legislative appropriations.—(1) No appropriations made by the Idaho legislature may be transferred from one object code to another except with the consent of the state board of examiners upon application duly made by the head of any department, office or institution of the state (including the elected officers in the executive department and the state board of education). No appropriation made for expenses other than personnel costs shall be expended for personnel costs of the particular department, office or institution for which it is appropriated.

(2) Legislative appropriations may be transferred from one program to another within an agency upon application duly made by the head of any department, office or institution of the state and approval of the application by the administrator of the division of financial management and the board of examiners provided the requested transfer is not more than ten per cent (10%) cumulative change from the appropriated amount for any program affected by the transfer. Requests for transfers above ten per cent (10%) cumulative change must, in addition to the above, be approved by legislative appropriation. Legislative appropriations shall not be transferred from one fund to another fund unless expressly approved by the legislature.

(3) All moneys appropriated to any agency of the state of Idaho for the purpose of capital outlay shall be used for that purpose and not for any other purpose. [1929, ch. 206, § 11, p 400; I.C.A., § 65-3411; am. 1973, ch. 302, § 2, p. 641; am. 1974, ch. 22, § 32, p. 592; am. 1980, ch. 358, § 14, p. 922; am. 1981, ch. 227, § 7, p. 450; am. 1983, ch. 84, § 2, p. 174; am. 1995, ch. 153, § 9, p. 620.]

Appendix I

Idaho Constitution, Article VII, § 17

§ 17. Gasoline taxes and motor vehicle registration fees to be expended on highways. —On and after July 1, 1941 the proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state and from any tax or fee for the registration of motor vehicles, in excess of the necessary costs of collection and administration and any refund or credits authorized by law, shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever.

(2)

Supreme Court, U.S.
FILED
OCT 30 1996
CLERK

No. 96-513

In The

Supreme Court of the United States

October Term, 1996

V-1 OIL COMPANY, an Idaho Corporation,

Petitioners,

vs.

IDAHO PETROLEUM CLEAN WATER TRUST FUND,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When the constitutionality of a state tax is challenged solely under the state constitution, and the state supreme court holds that the collection of the tax is legal under the state constitution, but that the money collected must, under the state constitution, be appropriated in a different manner than previously appropriated, does the Federal Constitution, nevertheless, require that there be a refund of the state tax previously paid?

2. When a state supreme court decides, as a matter of state constitutional or common law, that a plaintiff is not entitled to a tax refund of a state tax legally collected under the state constitution, and the plaintiff had the opportunity to brief on appeal the legal issue of entitlement to a tax refund, and did so in its petition for rehearing, are the plaintiff's federal due process rights violated?

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* This citation was unavailable when the petition for certiorari was filed.

STATUTORY AND RULE PROVISIONS

Article VII, section 17 of the Idaho Constitution is set out in App. I to Petition, p. 110a. Idaho Code § 1-205 is set out below:

1-205. Disposition of appeals.

> The court may reverse, affirm or modify any order or judgment appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. . . . [I]f a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case presented upon such appeal, and necessary to the final determination of the case.

STATEMENT OF THE CASE

Factual and Procedural Background

The Idaho Constitution, article VII, section 17, requires all taxes "on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways" to be used exclusively for highway-related purposes. Believing that this provision did not apply to levies on storage of petroleum products, in 1990 the Idaho Legislature created the Idaho Petroleum Clean Water Trust Fund (the "Fund"), which was financed by a one-cent per gallon fee on stored petroleum products. Petitioner V-1 Oil Company, a distributor of petroleum products, challenged the funding mechanism as violating the Idaho Constitution. Petitioner did not (nor could it) challenge the fee under federal law. In its opinion issued

August 3, 1995, the Idaho Supreme Court held that the Idaho Legislature had the authority to "assess and collect the fee at issue in this appeal," App. C to Petition, p. 41a, n.2, but that the proceeds had to be dedicated to the purposes set forth in article VII, section 17 of the Idaho Constitution, *id.* at p. 41a. Respondent, the Fund, sought rehearing, and rehearing was granted. Petitioner did not seek rehearing on the issue of whether the collection of the tax itself was legal or the consequences of this holding. Rehearing was granted and oral argument was held on December 11, 1995.

On April 16, 1996, the Idaho Supreme Court issued a substitute opinion, holding that because the *collection* of the tax did not violate the Idaho Constitution, as a matter of law, Petitioner was not entitled to a refund. The Idaho Supreme Court further held that while the collection of the tax was legal, the proceeds had to be appropriated in a manner consistent with article VII, section 17 of the Idaho Constitution. App. B to Petition, p. 29a. At this point, both parties petitioned for rehearing. Respondent asked the court to clarify whether its ruling regarding the appropriation of the funds was to be applied prospectively or retroactively. Petitioner asked the court to change its ruling on the refund issue and provided the court with extensive briefing regarding what it considered to be errors in the court's analysis. App. G to Petition, pp. 81a-96a.

On July 2, 1996, the Idaho Supreme Court issued another substitute opinion. *V-1 Oil Co. v. Idaho Petroleum Clean Water Trust Fund*, ___ Idaho ___, 920 P.2d 909 (1996). The court adhered to its view that Petitioner was not, as a matter of law, entitled to a refund, because the collection

of the tax, as opposed to its appropriation, did not violate the Idaho Constitution. App. A to Petition, p. 12a. The court further held that due to the reliance on the challenged statute by the Executive Department and the reliance on the insurance program by hundreds of individuals and companies in Idaho, the court would apply its holding in a modified prospective fashion, consistent with its precedent in a recent case asking for refunds of state taxes under state law, so that all monies collected after August 3, 1995, had to be appropriated consistently with the Idaho Constitution, but monies transferred to Respondent before then could be retained.[1] From this holding under state law, Petitioner attempts to fashion a federal claim.

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[1] The state tax case cited was *Potlatch Corp. v. Idaho State Tax Comm'n*, 120 Idaho 1, 2-3, 813 P.2d 340, 341-42 (1991) (court held that its interpretation of production exemption for state sales and use tax that overruled previous case decision and intervening practices of State Tax Commission inconsistent with the new rule of law would be given modified prospective application). The Idaho Supreme Court also cited two other cases, *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 25-26, 539 P.2d 566, 577-78 (1975) (decision overruling common law doctrine of interspousal tort immunity given modified prospective application), and *Baker v. Shavers, Inc.*, 117 Idaho 696, 697, 791 P.2d 1275, 1276 (1990) (decision overruling common law doctrine of open and obvious danger given modified prospective ruling), in support of its holding for modified prospective relief with regard to the remedy that monies previously collected could be retained up to the time of the court's decision, but had to be appropriated consistently with the state constitution from that time forward.

REASONS FOR DENYING PETITION

1. No Substantial Federal Question Is Presented

Petitioner has attempted to fashion a federal question where clearly none exists. The tax at issue was challenged solely on state grounds. The tax itself was held to be legal under the state constitution, with the state supreme court concluding that only the appropriation of the tax revenues ran afoul of the state constitution. This holding simply does not implicate a federal question. "[T]he construction that a state court gives a state statute is not a matter subject to our review." *New York v. Ferber*, 458 U.S. 747, 767, 102 S. Ct. 3348, 3360, 73 L. Ed. 2d 1113 (1982). "[S]tate courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S. Ct. 1881, 1886, 44 L. Ed. 2d 508 (1975).

However, in an attempt to create a federal issue where none exists, Petitioner relies on this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990), a case in which the Court addressed a state tax unconstitutional under the Commerce Clause, for the remarkable proposition that whenever a state tax is declared illegal, the federal due process clause mandates a refund. This is a grossly exaggerated reading of *McKesson*.

McKesson involved a challenge to a state excise tax as discriminating between intrastate and interstate commerce under the Federal Commerce Clause. The tax collection itself was invalidated as being discriminatory.

This Court held that the Due Process Clause of the Fourteenth Amendment obligated the state to provide meaningful "backward-looking relief" to rectify a tax collection that violated the Federal Constitution. *Id.* at 31, 110 S. Ct. at 2247.[2]

McKesson, its predecessors and its progeny are inapposite here. As a preliminary matter, *McKesson* was based on a challenge brought under the Federal Constitution. Here, no federal challenge was ever made to the tax at issue. It was challenged solely on state law grounds, and no federal rights are involved. This Court has never held

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[2] The Court gave the following examples of some allowable procedures for a tax remedy:

> The State might, for example, [1] provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; [2] execute any refunds on a reasonable installment basis; [3] enforce relatively short statutes of limitations applicable to such actions; [4] refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or [5] place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds.

496 U.S. at 45, 110 S. Ct. at 2254-55 (footnote omitted). The Idaho Supreme Court's remedy was consistent with the fourth remedy of the examples: The Idaho Supreme Court provided that taxes collected under the challenged scheme, which were not collected unconstitutionally, would have to be appropriated consistently with the constitution from the date that their previous appropriation was declared unconstitutional by the Idaho Supreme Court.

that, under the Federal Due Process Clause, when a state tax is declared to violate a state constitution, a refund is required. To the contrary, the same day *McKesson* was decided, this Court issued another tax opinion, *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 177, 110 S. Ct. 2323, 2330, 110 L. Ed. 2d 148 (1990), in which it held that "when questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions" and, further, "we think the Federal Constitution has no voice upon the subject of whether a state court may decline to give its decisions retroactive effect," quoting *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S. Ct. 145, 148, 77 L. Ed. 360 (1932).

More importantly, unlike *McKesson*, the tax collection at issue here was never held to be illegal. Rather, the Idaho Supreme Court held that moneys validly collected had not been appropriated in a manner consistent with the Idaho Constitution. This is very different from *McKesson*, where it was the discriminatory collection itself that violated the law. Petitioner seeks to avoid this important distinction by arguing that the Idaho Supreme Court's ruling on the refund issue and prospective application issue is contrary to several Idaho statutes and constitutional provisions. Petition, pp. 19-23. However, the Idaho Supreme Court, not Petitioner, has the final word on interpreting Idaho law. *Ferber* and *Mullaney*, *supra*. The Idaho Supreme Court was asked to determine whether a state tax violated the state constitution, and it concluded, solely under state law, that the tax itself was constitutional, but the subsequent appropriation of the monies was not. Because the tax itself is legal, the

McKesson holding, which applies to deprivations of property unconstitutional under federal law, not appropriation of tax revenues unconstitutional under state law, is simply irrelevant to this case.[3]

2. Petitioner Received Due Process

Petitioner, in a second attempt to fashion a federal question, argues that it did not receive due process because the Idaho Supreme Court *"sua sponte"* raised the refund question without giving Petitioner an opportunity to brief or argue that legal issue. Here, Petitioner has simply mischaracterized the record.

The Idaho Supreme Court was asked to determine whether the one-cent per gallon charge on stored petroleum products, used to finance the Fund's insurance program for petroleum storage tanks, violated the state constitution. From the outset, the court held the tax was constitutional. In its first opinion, issued August 3, 1995, the court stated the legislature was authorized to assess and collect the tax at issue. App. C to Petition, p. 41a, n.2. Under this holding, it should have been apparent Petitioner was not necessarily entitled to a refund.

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[3] The other cases cited by Petitioner – *Atchison, T. & S.F.R.R. Co. v. O'Connor*, 223 U.S. 280, 32 S. Ct. 216, 56 L. Ed. 436 (1912), *Ward v. Love County Board of Comm'rs*, 253 U.S. 17, 40 S. Ct. 419, 64 L. Ed. 751 (1920), and *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499, 48 S. Ct. 331, 72 L. Ed. 673 (1928) – also were decided under claims of violation of the Interstate or Indian Commerce Clauses. None involved a claim of violation of state law.

Nevertheless, Petitioner did not, at this point, seek a rehearing for clarification. However, Respondent, the Fund, did seek rehearing, which was granted. At this hearing, Petitioner clearly had an opportunity to discuss the refund issue with the Idaho Supreme Court and address its concerns. On April 16, 1996, the court issued a substitute opinion, clarifying that Petitioner was not, as a matter of law, entitled to a refund.[4] Once this opinion was issued, Petitioner sought rehearing and submitted an extensive brief to the Court, thoroughly discussing why it believed it was entitled to the refund. App. G to Petition, pp. 81a-96a. Respondent also submitted a brief in support

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[4] It is the established practice, as required by Idaho Code § 1-205, for the Idaho Supreme Court to pass upon questions that the lower court must reach after the case is remanded. E.g., *State v. Seitter*, 127 Idaho 356, 359, 900 P.2d 1367, 1370 (1996) ("we address the instruction issue because it is a question of law which may arise again during the new trial, and it is necessary to a final determination of the case"); *State v. Wengren*, 126 Idaho 662, 669, 889 P.2d 96, 103 (Ct. App. 1995) ("The longstanding rule of this Court is that we will not consider issues that are presented for the first time on appeal. The exception to this rule is that the constitutional issues may be considered for the first time on appeal if such consideration is necessary for subsequent proceedings in the case.") (citations and internal punctuation omitted), citing *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992), *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991), and *Messmer v. Ker*, 96 Idaho 75, 78, 524 P.2d 536, 539 (1974). There is no basis for Petitioner to argue that "ruling on the refund/relief issue was reserved for the trial court." Petition for Certiorari, p. 17. Nor is there any basis for Petitioner's assertion at pp. 17-18 that the Idaho Supreme Court does not address issues not raised before the trial court. In circumstances like this, the Idaho Supreme Court will often address such issues.

of a petition for rehearing, asking the court to apply its holding regarding the appropriations of the moneys prospectively. The Idaho Supreme Court clearly reviewed these briefs as it issued a second substitute opinion on July 2, 1996. It agreed to apply its holding in a modified prospective fashion, but adhered to its conclusion that Petitioner was not, as a matter of law, entitled to a refund.

Petitioner's assertion that it never was given the opportunity to argue or brief the refund issue is patently false. The refund question was always a subsidiary issue in this case, and it was extensively briefed by Petitioner in its brief supporting its petition for rehearing.

Further, it is simply not credible for Petitioner to assert this issue was raised *sua sponte* by the court. The court, in concluding the tax was legal, but the appropriation was not, was clearly faced with the follow-up question of what the proper remedy should be. It does not violate due process for a state appellate court, in interpreting the law, to also decide how its new rule shall apply and what remedies will be afforded the parties under the rule. See n.4, *supra*.

Likewise, Petitioner is in error when it asserts the refund issue should have been remanded for a factual determination. Had the Idaho Supreme Court determined a refund was appropriate because the tax itself was illegal, a remand for a factual determination of whether the tax was paid under protest and how much was paid would have been in order. But where, as here, the Idaho Supreme Court held as a matter of law that Petitioner was not entitled to a refund because the tax was legal, there

was no reason to remand for a factual determination, and the failure to do so did not violate due process.

Finally, Petitioner concludes its due process section by arguing the Idaho Supreme Court's holding was simply incorrect under various Idaho Constitutional provisions and statutes. Petition, pp. 19-23. These arguments were made to the Idaho Supreme Court in Petitioner's brief supporting a rehearing and were clearly rejected. Petitioner may disagree with the Idaho Supreme Court's construction of Idaho law, but that does not create a due process issue under the Federal Constitution. *Ferber* and *Mullaney, supra.*

In short, Petitioner has distorted the record to create a due process issue and, thereby, the necessary federal question for its petition for writ of certiorari to be granted. However, there was no due process violation here, and this petition should be rejected.

CONCLUSION

For the foregoing reasons, Respondent asks that this Petition be denied.

Respectfully submitted,

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No. 96-513

(3)

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

October Term, 1996

V-1 OIL COMPANY, an Idaho Corporation,

Petitioner,

vs.

IDAHO PETROLEUM CLEAN WATER TRUST FUND,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Idaho

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FURTHER REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL ISSUE IN THIS CASE ARISES BECAUSE THE SUPREME COURT OF IDAHO HAS VIOLATED DUE PROCESS BY DENYING V-1 OIL OF ANY CONSTITUTIONALLY SUFFICIENT REMEDY THAT WOULD PROTECT THEIR PROPERTY INTEREST IN TAX MONIES TAKEN FROM THEM PURSUANT TO AN UNCONSTITUTIONAL TAX SCHEME.

A. Due process requires a constitutionally sufficient remedy be provided to a taxpayer for any unlawful exaction.

The Respondent asks for this Court to deny Petitioner's Writ of Certiorari because of the independent state grounds by which the Idaho Supreme Court based its denial of any remedy to V-1. As such, Respondent erroneously believes that there is no federal question at issue in this case. It is obvious that the Respondent has very little understanding of due process principles and has, at best, not done more than a cursory reading and shallow analysis of *McKesson Corp. v. Division of Alcohol, Beverages and Tobacco*, 496 U.S. 18 (1990) and *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993). The federal question at issue here, despite the Respondent's erroneous assertion that only state law is implicated, is that the Idaho Supreme Court has deprived V-1 of all remedies for its unlawful exaction of tax monies pursuant to the Clean Water Trust Fund's "transfer fee."

Respondent's reliance on independent state grounds as a basis for this Court to deny Petitioner's Petition for Writ of Certiorari is irrelevant here. The federal constitutional question is what remedy must a state provide when it collects an

impermissible tax. Therefore, the Respondent's assertion that "the Idaho Supreme Court, not Petitioner, has the final word on interpreting Idaho law," is misleading to this Court because we are deciding a federal due process issue. (Respondent's Brief in Opposition, p. 6). The United States Constitution requires Idaho to provide a remedy consistent with federal due process principles when it collects an impermissible and unlawful tax. The fact that, "this Court has never held that, under the federal due process clause, when a state tax is declared to violate a state constitution, a refund is required," is what makes this case unique and possibly one of first impression to this Court. (Respondent's Brief in Opposition, p. 5-6). Here, the Idaho Supreme Court is holding that the state can take a taxpayer's money impermissibly and unlawfully and not provide any form of remedy. This clearly is repugnant to the notions of due process, and Petitioner is not aware of any other circumstances when the government can take money impermissibly and unlawfully and not provide for a remedy. Because the nature of the tax is one in which a person is deprived of their property, it should be obvious to Respondent that due process is necessary to protect taxpayers from unlawful and impermissible exactions as well as to provide a remedy. This Court has fashioned and articulated this principle in several cases including *McKesson* and, more recently, in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993).

McKesson holds that, "[b]ecause exaction of a tax constitutes a deprivation of property, the state must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the due process clause." *McKesson Corp. v. Division of Alcohol, Beverages and Tobacco*, 496 U.S. 18, 36 (1990). This decision illustrates that federal law sets a certain minimum requirement that states must meet, but may exceed, in providing appropriate relief when a taxpayer has involuntarily paid a tax that is later held to be unconstitutional.

The *McKesson* holding is broad, and emphatically stands for the principle that the United States Constitution requires a state to provide a remedy consistent with federal due process principles when a state collects an impermissible and unlawful tax.

The soundness of the *McKesson* holding is unquestioned. However, this Court underscored its holding in the later opinion of *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993). The *Harper* Court held that in a situation where a tax is impermissibly exacted, and, if there is no pre-deprivation hearing or other procedural safeguard sufficient by itself to satisfy the due process clause, "the due process clause of the Fourteenth Amendment obligates the state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Harper* at 101 (*citing McKesson* at 31). In *Harper*, decided three years after *McKesson*, this Court ruled on the appropriate remedy for a Virginia state statute which taxed federal retirees while exempting state and local retirees. Four hundred and twenty-one federal and civil service and military retirees sought a refund of taxes erroneously or improperly assessed. *Id.* at 91. The trial court, just as erroneously as the Idaho Supreme Court, denied relief and the Supreme Court of Virginia affirmed, relying on independent and adequate state grounds. *Id.* at 100. In reversing the judgment, this Court opined, "We do not enter judgment for petitioners, however, because federal law does not necessarily entitle them to a refund. Rather, the constitution requires Virginia to provide relief consistent with federal due process principles." *Id.* (*citing American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 181 (1990)) (internal citations omitted). Hence, despite Respondent's attempt to divert this Court's attention to an irrelevant state ground theory and to deny any federal issue, the principle is clear: the Constitution requires Idaho to provide relief consistent with federal due process principles for the unlawful exaction of taxes from V-1. It is undeniable that the

Idaho Supreme Court clearly contravened this Court's established precedent when it denied any remedy whatsoever to V-1 for the state's impermissible and unlawful tax.

As was pointed out in the Petition for Certiorari, without this Court's review, the State of Idaho has effectively deprived V-1, and all other parties who have paid the "transfer fee," of all constitutionally protected remedies; in so doing the State of Idaho will receive a windfall of approximately $50,000,000.

B. Idaho has not provided any remedy, much less a constitutionally sufficient one, for its unlawful exaction of tax monies from V-1, and therefore has violated the federal due process clause.

Despite this Court's precedent, which the Petitioner cited in its Petition for Rehearing, and the notions of due process, the Idaho Supreme Court has summarily denied any remedy to V-1 for challenging the unlawful exaction of taxes. V-1, as well as many others, have paid a sizeable amount into this impermissible tax scheme. To date, the fund contains in excess of $50,000,000. (Petition for Writ of Certiorari, Appendix F, p. 80a). This money now sits in a fund while the Idaho legislature eagerly waits to apportion it in a way that is consistent with the Idaho constitution. But obviously, the people who paid into the fund have been treated in a discriminatory fashion because they will not receive the benefit for which the Fund was intended. In other words, by completely depriving V-1 and others of any remedy, the Idaho Supreme Court has bestowed upon the State of Idaho what is tantamount to a $50,000,000 gift collected only from those who paid into the unlawful fund. Moreover, V-1 cannot go to the tax commission to seek further remedy. Despite statutory authority which allows for a party paying a gas tax erroneously to claim a credit or refund, V-1 is without a procedure, judicially or administratively, to seek any further

remedy. The highest court of Idaho has spoken and in spite of due process principles and this Court's clear precedent, they have taken it upon themselves to be the final arbiter in deciding V-1's remedy. V-1 is restrained by the court's ruling from seeking further remedy. However, in *Harper* it was held that the state itself must provide the appropriate remedy "so long as that relief satisfies the minimum federal requirements we have outlined." *Harper* at 102 (*citing McKesson* at 51-52).

In addition to the complete denial of any constitutionally sufficient remedy for V-1, it is important to note that because the Idaho Supreme Court ruled on the issue *sua sponte*, V-1 was never given the opportunity adequately argue, brief or present the remedy issue. The Idaho Supreme Court effectively "Blind Sided" V-1 when it arbitrarily ruled on the remedy issue. V-1's entitlement to a refund or other appropriate relief was never an issue on appeal to the Idaho Supreme Court. In fact, the trial court in its memorandum granting partial summary judgment expressly concluded that there existed a genuine issue of material fact as to whether V-1 was entitled to a refund. (Petition for Certiorari, App. "E" p. 75a-76a). The relief issue was therefore properly left for the trial court.

The Idaho Supreme Court also expressly recognized that the record was not sufficient to determine, as a matter of law, what remedy was available to V-1 Oil. (Petition for Writ of Certiorari, App. "A" p. 7a). Consequently, in the Idaho Supreme Court's August 3, 1995 opinion, the court did not address the remedy issue. At that point, V-1 was correct in believing that the issue would be resolved in the trial court. However, on rehearing and in the Idaho Supreme Court's substitute opinion of July 2, 1996, the Court contradicted its recognition that the proceedings below and record were insufficient, and ruled on the remedy issue anyway. This ruling was issued without a factually developed record, presentation of evidence, briefing, arguing or being an issue even certified for appeal.

Before the court's final substitute opinion of July 2, 1996 and after the court's substitute opinion of April 16, 1996, in an attempt to point out the court's grave error, V-1 submitted a Petition for Rehearing and Memorandum. However, the court summarily dismissed V-1's contentions without argument and flatly held V-1 was not entitled to a refund. Given the insufficient record, the lack of oral argument, briefing, the presentation of evidence and the fact that the remedy issue was never certified for appeal, it is overwhelmingly clear that V-1 has not been able to adequately present the issue. Therefore, Respondent's "patently false" accusation is unwelcome, and erroneous. (Respondent's Brief in Opposition, p. 9). Much like the Respondent's novice interpretation and analysis of *McKesson*, it is apparent that the Respondent also fails to appreciate the due process considerations that are required in our judicial system. V-1 was never given the adequate opportunity to argue, brief or present the remedy issue. As the *McKesson* and *Harper* courts have emphasized, "state law may provide relief beyond the demands of federal due process, but under no circumstances may [a state] confine petitioners to a lesser remedy." *Harper* at 102 (*citing McKesson* at 44-51) (internal citations omitted). In the case at hand, the Idaho Supreme Court has not just lessened the federal due process remedy to which V-1 is entitled, the Court has eliminated it altogether.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition for Writ of Certiorari, Petitioner respectfully submits this Court should grant the Petition for Writ of Certiorari.

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